JUDGMENT 3, 1973

3

Appeal No. 16 of 1972

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL OF NEW SOUTH WALES

IN TERM No. 645 OF 1970

BETWEEN

THE COMMISSIONER FOR RAILWAYS
THE COUNCIL OF THE CITY OF SYDNEY
and WYNYARD HOLDINGS LIMITED ... ... *Appellants*

AND

THE VALUER-GENERAL ... ... *Respondent*

TRANSCRIPT RECORD OF PROCEEDINGS

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No. 16 of 1972.

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No. 1

JUDGMENT OF HIS HONOUR MR JUSTICE ELSE-MITCHELL

In the Supreme Court of New South Wales Land and Valuation Court

No. 1

Reasons for Judgment Else-Mitchell, J.

HIS HONOUR: When the underground railway system of the City of Sydney was being constructed in the years before its opening for public use in 1932 a large area of land between George Street and York Street, including the present Wynyard Park, Carrington Street and Wynyard Lane, was excavated to a depth of forty feet or more in order to enable the construction of the Wynyard Railway Station with platforms, concourses, offices, conveniences, and access ways to and from George Street and York Street. After the railway works were completed the surface of the lands was made good, York Street and Carrington Street were restored to trafficable use, and Wynyard Park was converted into an attractive garden setting; at a later date the surface of Wynyard Lane, which runs parallel to George Street between that street and Carrington Street, was also restored so as to be capable of use by traffic, but s. 25 of the Transport (Division of Functions) Act, 1932, authorized the construction by the Commissioner for Railways of buildings under that lane and not less than twenty feet above it so as to leave room for the passage of traffic. Beneath the surface and adjacent to the platforms and other railway works the Commissioner for Railways constructed concourses and areas, parts of which have been let to commercial tenants as well as being used for access ways and incidental railway purposes, and provided passageways to George Street to enable members of the public to have access to and from the Railway Station and concourses.

The area between Carrington Street and York Street, excluding the surface of Wynyard Lane, the space twenty feet above it, and the passageways giving access between George Street and the Railway Station, had been the subject of a lease granted by the Commissioner for Railways in 1927, and in 1941 a further lease was granted of this area for the construction of a hotel; this lease, which was the subject of a good deal of litigation (Commissioner for Railways v. Avrom Investments Pty Limited, (1959) 59 S.R. (N.S.W.) 63) had become vested in a company which is now known as Wynyard Holdings Limited and on 19th December, 1961, a new lease of areas of land in the vicinity of Wynyard Railway Station was granted by the Commissioner for Railways to that company and the old lease of 1941 was surrendered. This new lease, which was varied in very minor respects

in 1963, demised to Wynyard Holdings Limited (hereinafter called the Company) for a term of ninety-eight years from 1st December, 1961, the following:

(1) A parcel of land under the Real Property Act, 1900, containing $16\frac{1}{2}$ perches having a frontage to Carrington Street of 49 feet $6\frac{1}{2}$ inches and a depth to Wynyard Lane of 90 feet $8\frac{3}{4}$ inches.

(2) A parcel of land under common law title containing 1 rood $1\frac{1}{4}$ perches, having a frontage to Carrington Street of 123 feet $4\frac{5}{8}$ inches and a depth to Wynyard Lane of 90 feet $9\frac{1}{8}$ inches and adjoining the land referred to in (1) above.

(3) A parcel of land under common law title containing 1 rood $9\frac{1}{2}$ perches, having a frontage to George Street of 147 feet $9\frac{1}{8}$ inches and a depth to Wynyard Lane of 91 feet $5\frac{5}{8}$ inches.

(4) A parcel of land under common law title comprising Wynyard Lane between the prolongation of the northern and southern boundaries of the land referred to in (3) above excepting thereout a stratum 20 feet wide and 20 feet high above the surface of that lane.

(5) Two areas of land under common law title containing 286 and 280 square feet respectively under the eastern footpath of Carrington Street, adjoining the land referred to in (2) above.

(6) An area of land under common law title containing 15,786 square feet under Wynyard Park and Carrington Street above the main concourse of Wynyard Station, with a variable height and adjoining the land referred to in (2) above.

The demise, which was by a lease complying with the Real Property Act, 1900, but under the seal of both lessor and lessee, was subject to several exceptions and reservations: the exceptions comprise, in addition to the surface of Wynyard Lane and a space twenty feet above it, the passageways to Wynyard Railway Station from George Street and Hunter Street, part of the lower basement under the lands referred to in (3) and (4) above, and various small spaces and areas above and below original ground level which represent the sites of a lift-well, some air ducts, and incidental plant. The lease reserved to the Commissioner the right to construct, maintain, and use these areas and spaces for a lift-well and ventilating shafts and for the installation of the necessary plant, as well as various incidental rights of access and passage over other areas, and also granted to the Company as lessee and its sub-lessees and invitees the right to use the passageways for pedestrian use and the lift at certain times for the transport of goods to specified parts of the demised premises.

In the course of time the company commenced the construction on the subject property of a large office block and a residential hotel, the former occupying the George Street frontage back to Wynyard Lane and the latter

having a frontage to Carrington Street and extending over Wynyard Lane into parts of the office block; the George Street office block now known as Wynyard House was built around and over the sloping passageways to Wynyard Railway Station and there was provided a new passageway or arcade from George Street to the Carrington Street frontage above Wynyard Lane; shops of various sorts and some hotel facilities and bars were built with frontages to these passageways so that they have in reality become shopping arcades. The residential hotel occupying the Carrington Street frontage now known as the Menzies Hotel was so designed that vehicular access could be had from Wynyard Lane to the demised area below Wynyard Park and Carrington Street ((5) above) which was fitted out as a parking area to accommodate motor vehicles and to which access could also be had by the lift system in the hotel.

During the month of October, 1962, at a time when the construction of Wynyard House had been substantially completed and was ready for occupation but the Menzies Hotel had been built only to the top of the functions room, which was the floor of the first level of bedrooms, the Valuer-General caused valuations to be made of the subject property as at dates in October, 1962, and determined a rating and taxing basis therefor under s. 61A of the Valuation of Land Act, 1916, as at 1st January, 1956. These valuations assessed the unimproved value at £1,250,000 ($2,500,000), the improved value at £4,000,000 ($8,000,000), the assessed annual value at £200,000 ($400,000), and the rating and taxing basis at £650,000 ($1,300,000). The subject property was described in the notices of valuation as having an area or dimensions of 147 feet 9 inches (the entire George Street frontage) and 172 feet 11 inches (the entire Carrington Street frontage) by 202 feet 3 inches (the southern boundary from George Street to Carrington Street including Wynyard Lane) and "irregular" (meaning the northern boundaries where the subject property abuts on the adjoining lands of Peapes & Co. Limited, 285–7 George Street, and those of the Shell Co. of Australia Limited, 1 Carrington Street; the descriptions in the notices of valuation in abbreviated form added the following note: "except thereout various strata; together with various strata under Carrington Street and Wynyard Park with appurtenant right-of-ways and subject to right-of-ways".

Notice of these valuations was given to the Commissioner and the Company and thereafter the Company by its agents lodged objections which claimed that the values were too high and that the situation, description, and dimensions of the subject property were not correctly stated. After the receipt of these objections the Valuer-General reconsidered the valuations and reduced the unimproved value to $1,100,000, the improved value to $4,400,000, the assessed annual value to $220,000, and the rating and taxing basis as at 1st January, 1956, to $569,000. Notice of these amended valuations was given to the Company's agent and to the Commissioner on 12th September, 1967, and on 20th February, 1969, the Commissioner objected to the amended valuations on every conceivable ground that was

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Reasons for Judgment Else-Mitchell, J.

available under the Valuation of Land Act and contended for an unimproved value of $5,000,000, an improved value of $10,000,000, and a rating and taxing basis as at 1st January, 1956, of $5,000,000; this objection was disallowed by the Valuer-General and notice given to the Commissioner accordingly.

At an earlier time—namely, on 17th November, 1967—the Council of the City of Sydney, as a rating authority under s. 31 of the Valuation of Land Act, had lodged objections to the amended valuations claiming that those valuations were too low, the area, dimensions, or description of the property were not correctly stated, and that lands which should have been included in one valuation had been valued separately; it contended for an unimproved value of $2,500,000, an improved value of $8,000,000, an assessed annual value of $400,000, and a rating and taxing basis as at 1st January, 1956, of $1,300,000. These objections were disallowed by the Valuer-General on 6th February, 1968, and notice given to the Council accordingly.

By various notices the Commissioner and the Council requested the Valuer-General to refer their objections to the amended valuations to a Valuation Board of Review and when the objections came before the Board they were, by consent of all parties, referred to this Court pursuant to s. 36M of the Valuation of Land Act and the Board notified the Court accordingly.

When the objections came before the Court for hearing in the situation which I have briefly recounted I held that as the Commissioner was seeking to show that the amended valuations made by the Valuer-General were too low he should begin, the Council should follow, and the Company should then present its case, the Valuer-General being the last party to submit evidence and argument. The course of the hearing of the objections was protracted and difficult and occupied almost a full month of the Court's time as well as that of four Queen's Counsel and five junior counsel and substantial consideration by many valuers of eminence in the City of Sydney. I mention these matters because what normally would have been a simple exercise in real estate valuation has been converted into a highly complex, abstruse, and at points an almost impossible task, because of the ill-conceived amendments made to the Valuation of Land Act in 1961 in an attempt to define and provide a means of valuing strata interests in land for rating and taxing purposes. The intractability of some of these amendments and the impracticability of the tasks which valuers and valuation tribunals are required to perform thereunder are such that immediate consideration should be given by the legislature to their repeal and the substitution either of a simple formula in general terms unconstrained by the inflexible assumptions which the amendments prescribe or of some apportionment provision such as was suggested by both the Supreme Court in previous litigation respecting the values of other premises at Wynyard Railway Station and by the Royal Commission on Rating and Valuation, and as are in fact contained in the Land Tax Management Act, 1956, and the Conveyancing (Strata Titles)

Act, 1961 (cf Commissioner for Railways v. The Valuer-General, 6 L.G.R.A. 237, at pp. 241, 249).

At the outset of the hearing of the objections lies the question of what should be valued, it having been contended in the first instance that the lease from the Commissioner to the Company had created a series of strata which could be valued only under ss. 7A, 7B, and 7C of the Valuation of Land Act. The various provisions of the Valuation of Land and Local Government (Amendment) Act, No. 66 of 1961, which added these and other new sections, such as ss. 27A, 28A, 28B, and 34 (2) to the Valuation of Land Act and the decision of the Supreme Court in Hurstville Super Centre Limited v. The Valuer-General (13 L.G.R.A. 56) as well as my own decision in that case (11 L.G.R.A. 389) were relied upon to support an argument that there was a complete statutory dichotomy between land and strata so that since 1961 pure land usque ad coelum et ad inferos only can be valued under the provisions of the Valuation of Land Act as they stood before amendment in 1961, and that any interest in land less than this and otherwise falling within the definition of "stratum" must be valued under the provisions added by the 1961 amendment. This argument requires inter alia a consideration of the definition of "stratum" added to s. 2 of the principal Act, namely:

> " 'Stratum' means a part of land consisting of a space or layer below, on, or above the surface of the land, or partly below and partly above the surface of the land, defined or definable by reference to improvements or otherwise, whether some of the dimensions of the space or layer are unlimited or whether all the dimensions are limited; but refers only to a stratum ratable or taxable under any Act;".

This form of defining something which it was held in the Lawrence Dry Cleaners Case (Commissioner for Railways v. The Valuer-General, supra) could not be valued is open to a wealth of criticism, and the learned counsel who appeared before me were not slow to point out its many deficiencies and ambiguities. I do not propose to repeat these but certain aspects of the definition must be discussed. Before doing so, however, I should deal with the important question whether there is a complete statutory dichotomy of the nature contended for by the Company.

It was argued on behalf of the Company that whatever may have been the position before 1961 the amendments made by Act No. 66 in that year created "an inflexible dichotomy" so that thenceforth a determination had to be made of what was true land in the sense of usque ad coelum et ad inferos which could be valued as such under the original provisions of the Valuation of Land Act on the one hand, and everything else which, because it was less than usque ad coelum et ad inferos, must be regarded as stratum and valued under the new provisions added in 1961.

I should at once say that I do not accept this as stating the position and consider that the 1961 amendments were directed exclusively at a limited field of interests of which it would not have been possible to deduce an

unimproved value. So much I should have thought was clear from the judgments in the Lawrence Dry Cleaners Case and the legislative history of the amendments. By way of digression I should say that since 1961 there may be a discretion in the Valuer-General to decide whether it is appropriate to treat particular property as land to be valued under ss. 5, 6, and 7 of the Valuation of Land Act, or as stratum under ss. 7A, 7B, and 7C, and the erroneous valuation of a limited interest in land as pure land or of pure land as stratum would not seem to me to result in the invalidity of the valuation but to be capable of correction on objection or appeal. It is true that s. 34 does not expressly specify as a ground that a valuation of land should have been a valuation of stratum or vice versa, but this must I think be implied as within the intendment of s. 34 (1) and (2), and the powers under ss. 35, 39 (6), and 40 are in any case adequate to allow the Valuer-General or this Court to make such amendments to valuations not only to conform with the grounds of objection stated but to correct any other matter appearing in the notice of valuation including the specification of the subject matter as land or stratum.

The primary conclusion I have expressed that there is no such dichotomy as was contended for is to be derived from a proper understanding of the scope and operation of the Valuation of Land Act in the form it took before 1961 and the central provision of which (s. 14) requires the Valuer-General to make valuations of all land in the State with certain exceptions. There is no limitation on the sense in which the word "lands" is used in this section and I should have no hesitation in saying that it can include land defined by horizontal as well as vertical boundaries; there is, moreover, nothing in any decision binding on me which militates against this conclusion and, indeed, there are authorities which support it. Upon this matter it is proper to keep firmly in mind that the provisions of the Local Government Act which were critical to decisions like Re Lehrer (6 L.G.R.A. 122) do not expressly or impliedly constrain or affect the operation or application of the Valuation of Land Act. That last-mentioned Act envisages the separation or division of land into parcels which may or may not be legally subdivided parcels under the Local Government Act and the valuation together of parcels owned by one person subject to limitations of title and contiguity (ss. 19, 26, 27, and 28; see Patullo v. Condobolin Municipal Council, 4 L.G.R. (N.S.W.) 82; Halloran v. Queanbeyan Municipal Council, 7 L.G.R. (N.S.W.) 130; Taree Municipal Council v Clarke, 13 L.G.R. (N.S.W.) 37; Nambucca Shire Council v. Brain, 2 L.G.R.A. 198); the Valuation of Land Act also envisages the separate valuation of the interests of lessors, lessees, and owners of fractional and other interests in land which in the case of improved and annual values must include buildings and parts of buildings on land (ss. 20, 21, 22). These provisions, consistently with authority and the long practice of the Land and Valuation Court, have led to valuations being made of parts of or interests in land less than the entirety usque ad coelum et ad inferos and, in many cases, to more than one valuation being made of different physical interests in the same parcel of land.

The instances in which this has been undertaken are too numerous to recount: one of the most common arises in respect of grants of land under the Crown Lands Act which limit the rights of the grantee as tenant in fee to the surface or to a limited depth of soil (cf Lawrence v. Fordham, (1922) V.L.R. 705; Crown Lands Act, 1912, s. 129B); others arise by virtue of exceptions and reservations in Crown grants (cf McGrath v. Williams, 30 W.N. (N.S.W.) 2); by the grant of surface interests over waterfront lands and by the separation of the title to minerals under the land from the ownership of the fee simple (cf Dover Street Estate Co. Ltd v. Cessnock Shire Council, 6 L.G.R. (N.S.W.) 119; Perpetual Trustee Co. Ltd v. The Valuer-General, 8 L.G.R. (N.S.W.) 135).

The propriety of making such a valuation of some less interest than the physical entirety of a parcel of land or of several parcels of land together or of a single valuation of separate interests therein is left in the first instance to the Valuer-General but subject to the right which s. 34 confers to have an objection dealt with by a Valuation Board of Review and the right of appeal to this Court; the grounds of objection specified in s. 34 which refer to the area, dimensions, or description of the land and the inclusion of lands in one valuation or separate valuations (s. 34 (1) (a1),(d), (e), s. 34 (2) (b), (c), (d)) are more than adequate to allow of the resolution of such claims that different interests less than the entirety should have been separately valued or included in one valuation or that the entirety or less than the entirety has been wrongly selected as the subject of the valuation. I conclude, therefore, that the Valuer-General has a primary discretion about these matters and that the selection of the subject matter of a valuation and the separation or amalgamation for valuation purposes of different parts of or interests in land can be undertaken by him at his discretion subject to the mandatory provisions of ss. 26 and 27 and to the rights of objection before a Valuation Board of Review and appeal to this Court.

In view of this summary of the position before 1961 it seems to me quite unreasonable to hold that the amendments made by Act No. 66 of 1961 intended to make new and more complex provision with respect to the numerous situations in which interests in land less than the entirety had previously been valued alone or separately from the residue and in which valuations of such interests were combined with valuations of the entirety of adjoining land. All that the amendments were concerned to do, as it seems to me, was to enable unimproved values to be deduced of areas which had been held to be incapable of such valuation in the Lawrence Dry Cleaners Case. A more logical answer to the problems raised in that litigation might perhaps have been to say that the interest in land there in question was capable of definition and valuation because it was in fact a separate parcel leased as such, but that the unimproved value to be attributed to it was nil; it obviously had an improved value which could have been determined without a great deal of difficulty and it plainly had an assessed annual value the ascertainment of which would have been a simple exercise (see the judgment of

Hardie, J. who reserved these questions, 6 L.G.R.A., at pp. 248–9). Upon this basis therefore a valuation under ss. 7A, 7B, or 7C is to be made only of such stratum interests of which it is possible to deduce a value for the purposes of the imposition of a rate or tax, this being the essential limitation imported by the concluding words of the definition "but refers only to a stratum ratable or taxable under any Act"; the significance of these concluding words will be referred to later.

Also relevant to the preliminary question of what should be valued is the provision in the definition of "stratum" which requires that it should be "defined or definable by reference to improvements or otherwise". Much debate ranged around these words and, despite observations in the Hurstville Case which may suggest the contrary, I am of opinion that the only sort of stratum which may be valued as such under ss. 7A, 7B, and 7C is a stratum which is defined by reference to improvements; that is the stratum must be an occupiable space within, upon, or under improvements. This may seem hardly satisfactory but the definition is so wide, if read literally, that it could include many interests in the nature of pure land and one must find some means of reducing it to rational limits : the limitation I have mentioned seems to conform to the clear object of the amendments made in 1961 as well as to the assumptions which ss. 7A, 7B, and 7C require to be made when valuing a stratum.

Apart from this aspect, however, it is proper to look at the instrument by which any so-called stratum is created if only because a stratum results from the act or agreement of parties. This instrument in the present case is the lease between the Commissioner and the Company which effects several demises of the different parcels or parts of land I have briefly enumerated and described at the outset of these reasons. These demises comprise inter alia the whole of the land between George Street and Carrington Street, subject to certain exceptions and reservations in favour of the Commissioner, and with the benefit of certain additional rights already mentioned. In view of their form I am disposed to take the view which I adverted to in the Hurstville Case that the demise of the land between George Street and Carrington Street ((1), (2), and (3) above) does not create a stratum but is a lease of the entirety of the land subject to exceptions and reservations in precisely the same fashion as a grant of land under the Crown Lands Act is a grant of the fee simple notwithstanding that it may be limited to the surface or a specified depth of soil and despite the fact that it excepts or reserves to the Crown indigenous timber, stone for road-making and proclaimed minerals (see the forms of land grant in Historical Records of Australia, Series I, Volume I, p. 310, Volume XII, pp. 390, 391; Crown Lands Act, 1884, s. 7; Crown Lands Act, 1912, s. 235; and for modern forms of grant see 8 L.G.R.A. at p. 73, 14 L.G.R.A. at p. 281).

It may be that the other subjects of the demise fall into a different category though I should myself take the view that the demise of Wynyard Lane (excepting thereout a space twenty feet wide and twenty feet high above

the pavement) was nonetheless a demise of land usque ad coelum et ad inferos with a statutory exception and not, as was submitted, a demise of a stratum below the surface and a stratum commencing twenty feet above the surface; it seems to me in principle no different from the grant of an estate excepting or reserving thereout a public way or private right-of-way and it cannot be said that the limits of the areas claimed to be strata are defined by improvements.

The three areas below Carrington Street and Wynyard Park on the other hand are clearly strata in substance and as demised are defined by improvements constructed under the surface of the land. I should therefore regard them as strata falling within the definition of s. 2 of the Act if they conform with the concluding words which limit that definition to strata "ratable or taxable under any Act". These words may, however, have an effect contrary to that suggested in some decisions of the Courts and could operate to put outside the definition many interests which have been conceded or assumed to be strata. Earlier decisions, particularly the Lawrence Dry Cleaners Case, have proceeded on the assumption that provisions such as s. 132 (1) and (2A) of the Local Government Act, 1919, have the effect of making liable to a rate on the unimproved value of land part of a building on land owned by the Crown or the Commissioner for Railways if that part is occupied under a lease from the Crown or the Commissioner by any person for private purposes (s. 132 (1) (g)). In Resumed properties Department v. Sydney Municipal Council (13 L.G.R. (N.S.W.) 170) Roper, J. reached the conclusion that one floor of the Mining Museum, a building erected on Crown land, was ratable under the Sydney Corporation Act, 1932, because it was leased to a private person, but an examination of the reasons for judgment shows that the decision depended upon special provisions of the Act which created dual or parallel rating systems—one contained in Division 1 of Part IX based on average annual rental values of "ratable property" and the other contained in Division 2 of Part IX based on the unimproved capital value of "ratable property". "Ratable property" was expressly defined in Division 1 to include "every building, whether vested in or occupied by the Crown or not, and all lands, whether occupied or not, within the city" (s. 118 (4)), and this definition was carried into Division 2 not "specifically", as Roper, J. observed (13 L.G.R. (N.S.W.), at p. 171), but by reference. Division 2 provided for the imposition of a rate upon the unimproved capital value of all ratable property (s. 140) and ratable property was defined to include land the property of the Crown which was ratable under Division 1 (s. 138 (1)). There were in fact no relevant exemptions from the rating of Crown land under Division 2 but s. 118 (6) in Division 1 provided that no land or building owned by the Crown should be liable to be assessed or rated in respect of any rate under the Act except inter alia "land or a building held under a lease from the Crown by any person for private purposes" (s. 118 (6)). It was in consequence of these provisions that Roper, J. held (at p. 172) that s. 118 "itself contemplates that part only of a parcel of land may be ratable" and the difficulty of computing the unimproved value of part

of a building was resolved by reference to s. 149 which, as His Honour observed, showed "that the Legislature had in mind just such a difficulty as this arising where the owner of land upon which a building is erected, had leased it to a number of different tenants and had provided in some or all of the leases that the tenants should pay the rates".

It seems to me a far cry from this decision and reasoning based on the provisions of the Sydney Corporation Act to say that s. 132 (1) (g) and (2A) of the Local Government Act operate to impose a rate upon a part of a building which is owned by the Crown or the Commissioner for Railways and leased to any person for private purposes, at least not where the only rate levied is on the unimproved value of the land. If s. 132 (1) (g) or (2A) has this effect, then it would seem logical and proper that a commercial tenant in a building owned by any of the exempt public bodies or charities mentioned in s. 132 (1) should be liable to be rated directly on a proportion of the unimproved value of the land on which the building is erected; and, by the same token, the owner of a building one floor of which is let to and occupied by one of the exempt public bodies or charities mentioned in s. 132 (1) should not be liable to be rated on the full unimproved value of the land on which the building is erected but only on some proportion based on the part occupied for non-exempt purposes. It was possible, no doubt, for this result to ensue under the Sydney Corporation Act the provisions of which were primarily directed to the imposition of rates computed upon average annual rental values, but it seems to me incorrect to hold that the same result can be reached by the application of the provisions of s. 132 (1) or (2A) of the Local Government Act, or those of the Metropolitan Water, Sewerage and Drainage Act, 1924, at least in the absence of a special valuation under s. 97 (4) of that Act; there is, moreover, the added problem of whether a part or stratum of land under a public road or public park can be ratable under the Local Government Act (cf s. 132 (1) (c) and (i); Wynyard Investments Pty Ltd v. Metropolitan Water Sewerage and Drainage Board, 19 L.G.R. (N.S.W.) 26). In expressing these views I am not unconscious of the decisions in Y.M.C.A. v. Sydney City Council, 20 L.G.R. (N.S.W.) 35, and Boy Scouts' Association v. Sydney City Council, 4 L.G.R.A. 260, but in those cases the applicability of Roper, J.'s decision to the Local Government Act was assumed without question; what is more important, however, is that I am precluded from giving effect to the views I have expressed by the Lawrence Dry Cleaners Case and, regardless of my personal opinion, I am bound to hold that s. 132 (1) (g) or (2A) of the Local Government Act is effective to impose a rate upon some part of land the subject of a lease from the Crown (including the Commissioner) which is less than the entirety usque ad coelum et ad inferos. I must therefore proceed to consider the objections on the basis that each of the three areas referred to in (5) and (6) above is stratum within the definition in s. 2 of the Valuation of Land Act and must be valued under ss. 7A, 7B, and 7C of that Act.

The question which next arises on the assumption that the subject property comprises both land and strata is whether they can be included in the one valuation. In the Hurstville Case it was held that the provisions respecting the valuation of strata were a separate code (11 L.G.R.A., at p. 395; 13 L.G.R.A., at p. 70, pp. 70–71) but this conclusion is not I think to be taken as a binding authority: before this Court the view that there could not be an amalgamation of land and strata for the purposes of valuation was based upon a very limited conception of a stratum as a space or area within strict horizontal and vertical boundaries; this view was rejected by the Supreme Court but in that Court it was taken as conceded that there should be separate valuations (at pp. 70–71). There were in any case some unusual features of the Hurstville Case, more particularly because at the time of the valuation the true land did not, on the assumptions which s. 7B required to be made, adjoin the stratum as it then existed and was then definable by improvements and in this sense the making of separate valuations was justifiable. Moreover, I think it fair to say that the full implications of the provisions relating to the valuation of stratum which were added to the Valuation of Land Act in 1961 were not fully explored in that case as they have been in the present. I therefore propose to discuss this question freely from authority.

Reference has already been made to the extreme complexity of the task which the provisions of ss. 7A, 7B, and 7C impose on valuers and appellate tribunals which determine values and I am compelled to say that measures of practical expediency will have to be taken if they are to work in any reasonable way. Valuation is at root a practical matter and should be carried out in the light of the opinions of those who are skilled appraisers and assessors. To import into the valuation process by way of assumption or otherwise elements of impossibility or serious impracticability would be tantamount to denying an effective operation to statutory provisions which require the making of valuations reflecting a market demand even if the market be somewhat hypothetical. For this reason at least I should be disposed to treat land and stratum as capable of being valued together where practical considerations commend that course and, even if I am wrong in my conclusion that the bulk of the demise between George Street and Carrington Street consists of true land, I should certainly endeavour to avoid the approach to valuation submitted in the course of the hearing which proceeded on the basis of slicing the existing buildings on the site so as to create what were called "land islands" representing those parts of the whole site into which there were no intrusions of stratum at any level. This approach was said to be based on a literal application of s. 7B which requires the assumptions to be made that there are no improvements within the stratum to be valued and that the lands outside the stratum are in their present condition, but in view of the conclusions I have already stated I do not propose for the present to pursue its intricacies which sought to clothe the impossible and the impracticable with some sense of reality.

Apart from the practical considerations to which I have already referred, I am of opinion that the provisions of the Valuation of Land Act justify the valuation together of land and stratum where they physically adjoin and are in the one ownership as s. 27 provides. There is no question of separate title for there can be a freehold or leasehold estate in a stratum of the same nature and having the same incidents as a freehold or leasehold estate in pure land and, as the lease to the Company shows, they can be created and disposed of by the one instrument, the one grant, or the one demise. I should repeat, perhaps, in answer to the submission that the subject property should be valued on the basis of land islands and the residue separately, the observation I have already made that the Valuation of Land Act proceeds on the basis that a valuation is to be assigned to each parcel of land with the qualifications of s. 26 and following sections but that these provisions provide no justification for the arbitrary subdivision of an area or parcel of land. be it pure land or stratum in the absence of any physically identifiable criterion marking a subdivision, or the separation of ownership or occupation and, on the contrary, they encourage the valuation together as one parcel of adjoining lands which are of the same tenure and are not separately let.

The foregoing reasoning leads me to the result that it was open to the Valuer-General to make a valuation of the whole of the property comprised in the lease of 19th December, 1961, and to deduce for the whole of the subject property single figures for the unimproved value, the improved value, the assessed annual value, and a rating and taxing basis respectively. I reach this result primarily upon the basis that the main subject matter of the demise was of pure land, namely, that lying between George Street and Carrington Street, and that it is permissible to include in a valuation of pure land a stratum which physically adjoins and is in the same ownership and of the same title. If, contrary to this view, the main subject matter of the demise is to be regarded not as land but as predominantly stratum (excluding the land islands) I should hold that all the strata may be valued together and that such a valuation can include also areas of true land (the land islands) because they are not separate parcels in any sense and as a practical matter should be valued along with the strata surrounding and adjoining them. The basis or method of valuation to be adopted if one is obliged to regard the predominant subject matter of the demise as stratum and the language of ss. 7A, 7B, and 7C as so intractable that the fragments of the buildings on the land islands must be assumed, contrary to nature, to be in existence and stable will be deferred for later discussion.

In approaching the ascertainment of the values of the subject property I propose to deal in the first instance with the unimproved value alone and to deduce values separately for the true land under s. 6 of the Valuation of Land Act and for the three areas of stratum under s. 7B of that Act in broadly the same fashion as was done by most of the valuers. I then propose to consider alternative bases of valuation and in particular the values which should be assigned to the subject property if it is regarded predominantly as stratum.

The question of unimproved value on any approach requires the hypothesis of a buyer and seller in the market each cognizant of the potentialities of the subject matter offered for sale. The potentialities of the subject site which the valuers described as unique were, at the relevant time in 1962, considerable for the volume of passenger traffic in and out of Wynyard Railway Station by George Street was greater than that of any other underground railway station in the city and reached a daily total of over 27,000 each way in two and a half hours of the evening and morning peak periods and this is probably the greatest concentration of pedestrian traffic anywhere in the City of Sydney. This volume of traffic had, prior to October, 1962, attracted banks and other business enterprises to acquire properties in George Street close to Wynyard Railway Station so that commercial advantage could be gained from the passing railway patrons and other pedestrians. Moreover, the Australia Square project which had been initiated before 1962 gave promise of some physical improvement of the locality lying to the north-east of the Railway Station exits and of an up-grading of its aesthetic and commercial qualities. All witnesses agreed that the pedestrian traffic to and from Wynyard Railway Station gave the frontages to George Street in that locality a special stimulus and this was borne out by several sales proved in evidence in the years 1959 to 1962 of premises thereabouts at prices varying from $113 per square foot to $176 per square foot; but some of these sales included buildings which were retained and used by the purchaser after renovation and they were all of sites smaller in size than the subject property. There were also some sales in the years 1958 to 1963 of properties in Carrington Street and York Street not far removed from the York Street entrance to Wynyard Railway Station and the omnibus terminals nearby but at much lower figures of $50 to $98 per square foot inclusive of buildings.

These sales were taken by the valuers as a basis for deducing a value for the subject property but there were differences in the major approaches made to value: one approach was to take values derived from sales of George Street properties as applicable to the whole site between that street and Carrington Street on the basis that availability of access to Wynyard Railway Station would impart to the Carrington Street block the same value as land on the George Street frontage; another approach was to value the George Street block by the application of values deduced from sales of land in that street and the Carrington Street block by the application of values deduced from sales in or near that street; a third approach involved the averaging of the values which would be appropriate for a frontage to each street; and there were also differences in the methods by which the land under and above Wynyard Lane should be valued.

Each of these approaches proceeded, rightly in my view, upon the direct application to the subject property of sales of true land in the locality where the influences of pedestrian traffic, convenience, amenity, and so on were reasonably comparable. Alternative means of deducing a value for the property by capitalization of the rent under the lease or of net rents which

could be obtained from a hypothetical or actual building on the site were discussed, but in my opinion these would not reflect value as well as the direct application of sales in the open market and these alternative methods would involve large limits of tolerance, estimate, and consequent error (cf. A. G. Robertson Ltd v. The Valuer-General, 18 L.G.R. (N.S.W.) 261). The application of sales of other lands of which vacant possession was not available or which were not as proximate to the subject property, such as the Imperial Arcade, Carlton Centre, and Australia Square sites was also, I think, open to the criticism that differences of this sort can substantially affect values and introduce errors for which compensatory adjustments cannot be made. This is perhaps saying no more than that sales on different terms or of lands removed from the George, Carrington, and York Streets locale should not be regarded as truly comparable; understandably they would not manifest the same potentialities stemming from proximity to a busy city railway station and an area of pleasant outlook and convenience like Wynyard Park and these factors alone are sufficient to justify the rejection of sales in other parts of the city as guides to value.

In the application of the sales which it seems to me proper to treat as comparable, that is, of premises in George Street, Carrington Street, and York Street, the valuers took differing views on some matters such as the amount to be attributed to structures, the diminishing value of long depths, and the value of arcade development, but there was fairly general agreement that the sales of George Street sites manifested "a Wynyard influence" which diminished with the distance of premises from the Wynyard Railway Station entrances, and the reason for this is that as the number of railway and omnibus patrons is reduced the commercial potentiality of a site is less. There is no doubt that the railway patrons emerging from Wynyard Railway Station disperse in different directions—some north or south along the western side of George Street, some across to the eastern side of George Street, and then to the north or south or along Hunter Street—so that the owner of any site north or south of the Railway Station entrance and on either side of George Street cannot expect all the railway patrons to pass in front of his site; but the great and unique potentiality of the subject site is that all railway patrons (other than those using the York Street entrance) must of necessity pass through and in front of the site or some part thereof in both leaving and going to the Railway Station. It thus is not unreasonable to say that the value of the subject site should not be less than but should be more than the value disclosed by a sale of any other land in George Street, whether it be to the north, the south, or on the opposite side of that street. Whilst this would support the adoption of the highest values disclosed by the evidence and by comparable sales, those sales were of smaller sites and witnesses agreed that at the relevant time in 1962 no major development on a site of this size in the City of Sydney except the Australia Square project had been commenced or proposed. This fact was urged in favour of treating the property as two sites rather than as a single one or of allowing, as some of

the valuers did, a discount for its large size but if this were done any such discount would not outweigh the special added advantage of the location of the subject site over other sites in George Street and there are, in any event, countervailing factors to be considered.

Taking these and all other relevant matters into account, I should adopt for that part of the land between George Street and Wynyard Lane (13,524 square feet) a value of $120 per square foot. This is the value assigned to it by Mr C. O. Litchfield and represents approximately the same value as that reached by Mr H. A. Gorman on a slightly different basis; it is rather more than the values given by Mr R. T. Clutton ($110 per square foot), Mr R. W. Neal ($115 per square foot), and Mr C. A. Woodley's approximation of $100 per square foot, but less than Mr K. W. Hodgson's valuation ($126 per square foot). I would also, in the light of similar considerations including the proximity of the omnibus terminals, adopt for the land between Carrington Street and Wynyard Lane (15,717 square feet) Mr Litchfield's value of $60 per square foot which is the same as Mr Hodgson's and more than Mr Clutton's and Mr Woodley's $50 and Mr Neal's $55. These figures do not include the area above and below Wynyard Lane which some valuers thought should be included with the land or apportioned between and added to the George Street and Carrington Street blocks. On this matter Mr Litchfield said that if the property were to be treated as an entire block extending from George Street to Carrington Street the exclusion of the surface of the lane and a space twenty feet above it would not significantly reduce the value because a purchaser would regard the lane as providing convenient access to and from the centre of the building, without the necessity for maintaining the pavement, providing vehicular access from the main street frontages, and with the consequences of trade vehicles obstructing those frontages; he accordingly thought that the lane should be valued at $90 per square foot which is an arithmetical average of the values assigned by him to the George Street and Carrington Street lands. Mr Hodgson took the view that the lane would be preserved as a service corridor but he thought it should be valued at $80 per square foot which is less than the average of the other lands and because it suffers some disabilities I adopt this figure for the 2,965 square feet of the lane.

There are some subsidiary matters which fall for determination before I pass to areas which I consider should be valued as stratum. The first of these is the value, if any, to be attributed to the excavation of the site between George Street and Carrington Street. There is a preliminary question whether the excavation is a "site improvement" or not within the definition s. 2 of the Valuation of Land Act for the purpose of reaching an unimproved value under s. 6 and Mr Officer, on behalf of the Valuer-General contended that it was not. It appears to me, however, that an excavation of land will be a site improvement if it in fact operates to improve the land and, of course, not every excavation has this effect: in illustration a brick pit 200 feet deep would hardly be classified as an improvement to urban land but an excava-

tion of a city block to a level which would conveniently provide a basement and reduce the cost of constructing the sort of building currently being erected in the city should certainly be characterized as an improvement. In view of the evidence of witnesses who said that it had been normal in recent years to excavate city building sites to a depth of about 40 feet I should hold as a matter of fact that the excavation of the subject site between George Street and Carrington Street was an improvement of the land and its value should therefore be added to the value of the land in an unexcavated condition for the purpose of reaching an unimproved value under s. 6 of the Valuation of Land Act.

Different estimates were given of the cost of excavation varying from $3.60 per cubic yard to $5 per cubic yard, to which should be added something representing the savings to a purchaser of holding charges because he would not have to await the completion of excavation work before commencing the construction of a building; these would include rates and taxes on the land and interest on the purchase price of the land. In calculating these items I adopt the cost deposed to by Mr Swan whose experience in excavation work has been extensive, although I think that his figure of $3.60 is really bedrock, but I am not able to accept his optimistic estimate that the work of excavation could be completed in the minimum period of twenty-six weeks which he allowed; I should rather be disposed to say that, making reasonable provision for wet weather, traffic problems, the possibility of restraining action by court process or otherwise, and other contingencies, a period of seven months would be more appropriate. These figures would give to the site an added value represented by the following items based on Mr Swan's estimate of the cost of excavation and Mr Litchfield's figures of rates, taxes, and interest, adjusted to a price of $2,800,000 and a period of seven months.

	$
53,500 cubic yards of excavation at $3.60 . .	192,600
Interest on $2,800,000 at 8 per cent for 7 months	130,666
Rates and taxes for 7 months	98,084
	$421,350

A second matter concerns the extent, if any, to which any deductions or additions should be made to or from the values which I have held should be adopted for the site between George Street and Carrington Street by reason or in consequence of the exceptions and reservations in favour of the Commissioner. There is, I think, apt to be some confusion on this question partly because it is not clear whether the exceptions and reservations arise only by agreement or by statute and partly because of the different bases for reaching unimproved values under s. 6 and s. 7B. If the site is regarded as land to be valued under s. 6 any statutory exceptions or reservations should

be taken into account but those resulting from mere agreement, like easements or restrictive covenants, should be ignored because the valuation is of a hypothetical fee simple (Gollan v. Randwick Municipal Council (1961) A.C. 82) but this is not the position under s. 7B.

I do not think, however, it is necessary to pursue this question because any valuation of the site between George Street and Carrington Street must take cognizance of the existence of Wynyard Railway Station and, whether a legal right of passage for railway patrons is inferred or not, the evidence of some of the valuers satisfies me that a purchaser would regard the potentiality of so many persons passing through or across the subject site as an enchancement in its value as pure land: this potentiality would lead a purchaser interested in developing the site most advantageously to provide passageways linking George Street with the Railway concourse and to construct arcade shops with frontages to those passageways; Mr Neal who, along with other valuers, gave consideration to this aspect described the large pedestrian flow to and from the Railway Station and the omnibus terminals in Carrington Street as "a tremendous advantage" and in his valuation said:

> "The existence of the railway's own concourse on the west, and the Hunter Street tunnel on the east and the need for pedestrians to get from George to Carrington Streets suggest that arcade development, such as presently exists, would be most sensible. The earning capacity of such shops, compared with that likely to be earned on similar floor levels in adjoining sites, is a factor going to increase the whole site value compared with other sites."

Mr Clutton made calculations which sought to show the extent to which the value of the site was increased by this arcade potential and whilst I do not accept these for all purposes I am satisfied that the increment in value far exceeds any diminution in value resulting from the exclusions and reservations in the lease for passageways, lift-well, air ducts, and the like. Mr Gorman also thought that the arcade potential represented a substantial addition to value of the order of 10% and this sum he included as an increment to the value of both the George Street and Carrington Street lands; calculations made by Mr Bird, the Deputy Valuer-General, put the increment between 24% and 27%. This added value has, of course, been taken into account to some extent in the value adopted for the George Street site but it is not included in the figure adopted for the Carrington Street site, which is based on sales of lands with only frontage-pedestrian-potential. It would therefore be proper to add to the value of the Carrington Street land a sum representing the value of the potential arcade development under that site to serve railway patrons but some contrary considerations which were put forward by the Company should first be discussed.

It was contended that the design, size, and levels of the passageways as they have been built were not such as to exploit to the full the potentiality of the site for arcade shops, and various alternative schemes were propounded

by the Company's witnesses, entailing the installation of escalators and horizontal instead of sloping passageways. I am satisfied, however, upon the evidence and a close examination of the plans that it would not have been advantageous to have narrower passageways on a horizontal plane with escalators: the head-room would not have been adequate, there would have been a prospect of undue crowding which could adversely affect the attraction of the shops, and the cost of installing and maintaining the necessary banks of escalators could outweigh any benefit of larger letting areas. There was indeed quite a volume of evidence that the existing development which has been undertaken represents as economic and practical a method of exploiting the passing pedestrian traffic as could readily be conceived. Another contention was that there must also be considered, so far as they may be relevant, the exceptions and reservations in favour of the Commissioner of lift-wells, air ducts, the lower basement and rights of access thereto. So far as the lift-wells and air ducts are concerned the total space they occupy is not significant and the capital value attributed to them by Mr Hodgson was of the order of $57,000 which is less than 7½% of the value of the Carrington Street land. The basement is perhaps of less significance; Mr Litchfield reached a capitalized value for it of $30,000 which is about 3% of the value of the Carrington Street land but added that if the cost of making the space usable were taken into account the difference was not worth considering. Upon these figures I think it clear that the total value of the areas excepted and reserved to the Commissioner is far less than the enhancement in value of the Carrington Street lands resulting from the passageways and potential arcade development and I therefore do not propose to make any adjustment by way of deduction from or addition to the values of the land for or in respect of the passageways, lift-wells, air ducts, plant rooms, and lower basement. I thus reach an unimproved value for the site between George Street and Carrington Street, including Wynyard Lane, of $3,224,450 made up as follows:

	$
George Street block	1,622,880
Carrington Street block	943,020
Wynyard Lane	237,200
	2,803,100
Added cost of excavation	421,350
	3,224,450

The stratum interests consisting of the land under Wynyard Park and Carrington Street must, on the view I have taken, be valued as s. 7B of the Valuation of Land Act requires and using a capitalization method (of Sheath v. The Valuer-General, 10 L.G.R.A. 20) the valuers have arrived at substantially divergent figures for these areas ranging from $49,050 to $221,720.

The ascertainment of an unimproved value for these areas is most difficult because in the first place it is necessary to ascertain what improvements are within the stratum as these must be assumed not to have been made (as paragraph (a) requires) and, secondly, it is necessary to determine what lands are outside the stratum as these must (under paragraph (c)) be assumed to be in their existing condition. This may be a consequence of some inadequacy or omission in the plan and description of the strata in the lease for they do not indicate whether the subject matter of the lease is a space enclosed wholly within improvements consisting of reinforced concrete walls, floor, and ceiling, or on the other hand a space enclosed only by the limits of the excavation, that is, by the stone or rock into or against and upon which the walls, floors, and ceilings were subsequently constructed; obviously there will be a substantial difference in the value to be deduced for the stratum under s. 7B according to the limits assumed. The lease is, as I have said, not explicit on this matter but I infer from the references on the three plans of the respective areas to ceiling and floor levels that the stratum in each case consists of the space wholly within the walls, floor, and ceiling as constructed. What then have to be valued are areas of basement space of the following dimensions:

(1) 286 square feet being the lower basement below Carrington Street footpath having a constant height between floor and ceiling of twelve feet;

(2) 280 square feet being the basement below Carrington Street footpath having a variable height (due to a sloping ceiling) of between about twelve feet and twelve feet six inches;

(3) 15,786 square feet being the area below Carrington Street and Wynyard Park having a height of about twelve feet at the eastern end and nearly sixteen feet at the western end.

The first of these areas is at a level which would be inconvenient of access so that it could have a value only for the storage or housing of plant (for which it is in fact used) and assuming a net rent of 50c per square foot (Mr Clutton's figure) it would on a capitalization basis of 15 per cent have a value of $987.

The second area is on the Hunter Street passageway level and should be taken to include access over an area of 47 square feet which separates it from the passageway and which was subsequently included in the demise from the Commissioner to the Company by an amending lease executed in 1963. I should take the view that this area would have a value as an arcade shop and would yield a net rental of not more than $5 per square foot, a figure based in part on the rental fixed for the additional 47 square feet by the supplementary lease in 1963. Adopting this figure and applying it to the area of 280 square feet only (the 47 square feet being regarded as access and not then included in the demise) the capitalized value at 15 per cent would be $9,333.

The third area which is much more extensive consisting of 15,786 square feet should be regarded as having a special value to Menzies Hotel as a parking area and for the purposes of s. 7B the hotel and the access ramp to this area must be assumed to be in existence. I should therefore reject as a basis for valuing this area the comparative cost of warehouse space but would assume that its best and most profitable use would be as a parking area for hotel guests and patrons; this was in fact the basis taken by Mr Clutton and Mr Woodley and one of those taken by Mr Litchfield. In view of the convenient and close location of this space to the hotel I should not be prepared to apply the rental yielded by the lease of the old tramway tunnel which is rather more remote and inconvenient, at any rate not without a substantial adjustment, but on the assumption that the area would accommodate between 60 and 100 cars it should yield a net return of not less than $150 per car space per year after allowing for interest on minimum improvements such as lighting; this would, on a constant occupancy of 70 cars, represent a net annual income of $10,500. Capitalizing this at 15 per cent a value is deduced for the space of $70,000.

Summarizing these valuations of the stratum interests I reach a total value for them as follows:

	$
286 square feet in lower basement	987
280 square feet in basement on Hunter Street level .	9,333
15,786 square feet under Carrington Street and Wynyard Park	70,000
	80,320

In accordance with the conclusions I have earlier expressed as to the inclusion of values of stratum and values of land in the one valuation, I find the unimproved value of the subject property, consisting of land with approximate dimensions of 147 feet 9 inches to George Street, 172 feet 11 inches to Carrington Street, with side boundaries of 202 feet 3 inches on the south and an irregular boundary on the north, together with three areas of stratum under Carrington Street and Wynyard Park comprising 286 square feet, 280 square feet, and 15,786 square feet, respectively, to be $3,304,770. I hold accordingly that the unimproved valuations of the Valuer-General of which notice was given on 12th September, 1967, were erroneous and that the descriptions in the notices of that date were erroneous and I propose to make orders that such valuations be altered as follows:

(a) by deleting therefrom the reference to "stratum" or "strata";

(b) by substituting for the description the following: "land with a frontage to George Street on the east of 147 feet 9 inches, a frontage to Carrington Street on the west of 172 feet 11 inches, a southern boundary of 202 feet 3 inches, and an irregular

northern boundary of 111 feet 5⅜ inches westerly from George Street 24 feet 10⅝ inches northerly along the western side of Wynyard Lane and 90 feet 8¾ inches westerly to Carrington Street, together with spaces of 286 square feet, 280 square feet, and 15,786 square feet within walls, floors, and ceilings constructed in excavations under Carrington Street and Wynyard Park and as otherwise described on plans "E", "F", and "G" annexed to the lease from the Commissioner for Railways to Wynyard Holdings Limited";

(c) by substituting for the unimproved value the sum of $3,304,770.

If, contrary to the conclusions I have reached, it is not proper to include a valuation of stratum with a valuation of pure land, I would find the value of the subject property defined as set out in (b) above with the exception of the spaces under Carrington Street and Wynyard Park to be $3,224,450. In taking this course I would be assigning to the main subject matter of the valuations made in October, 1962, and which were altered in 1967 a new or correct valuation in place of that which I hold to be erroneous. Upon this question it was contended that the valuations of 1962 were valuations of stratum and that the Court cannot alter a valuation of stratum so as to convert it into a valuation of land. I consider, however, as the oral evidence established beyond any doubt and as the descriptions in the notices of valuation indicate, that the subject matter of the 1962 valuations was land having dimensions of "147 feet 9 inches, 172 feet 11 inches, 202 feet 3 inches and irregular" (subject to and together with certain strata). These dimensions cannot refer to or describe anything but the main block of land between George Street and Carrington Street and their effect is not to be derogated from by the injudicious and inappropriate use of the word "stratum" on the notices of valuation against printed words and having no relevance to the property as otherwise described; I should add in any case that the other matters included at the head of the notices of valuation such as the title references, the street numbers 289–307 George Street, and the nature of the improvements support the conclusion that on its proper construction the valuation was of the land. This being so the valuation of land altered by the Valuer-General in 1967 to a valuation of strata, which I have held to be erroneous as to description and amount, can be altered again in the fashion I have suggested.

If, however, the proper course is to treat the valuation as of stratum there are two possibilities, first that I can determine a value as stratum of the whole subject of the demise including any true land so demised, and secondly that I can determine a value of pure stratum alone. If the former course is the proper one it would be necessary to treat the subject matter of the valuation as of the demised areas only but to exclude from consideration those areas outside the stratum which are excepted from the lease and reserved to the Commissioner; these are the lower basement, the passageways, lift-well, air ducts, and certain areas over which the Commissioner has a right of passage. No doubt also it might be proper to give

consideration to the question whether the same added value of $421,350 should be allowed for the excavation, since the occupancy of the strata would begin at a level above the lower basement which is excepted from the demise. But in respect of these matters the assumptions must be made under s. 7B of the Act that the basement, passageways, lift-well, and air ducts have been constructed and this would mean that some part of the foundations, lift shaft, passageways, floors, and ceilings must be taken as having been constructed at the cost of someone else and to this extent a purchaser of the strata would be prepared to pay no less a price than for the fee simple of the entirety particularly in view of the evidence already referred to that the passageways enhance the value of the site to an extent exceeding any detriment resulting from the exceptions and reservations. I should therefore find the unimproved value of the property demised by the Commissioner to the Company inclusive of any true land covered by that demise but subject to the exceptions and reservations in the lease to be $3,304,770.

In stating this view I have declined to treat the lease as separately creating stratum interests in respect of part of the site between George Street and Carrington Street and interests in pure land represented by the so-called "land islands". The reasons for this I have already given and to them I would add that if the definition of stratum in s. 2 of the Act is to be interpreted widely, contrary to the construction I have already adopted, I see no reason why the whole area demised by the lease, extending from the eastern frontage of George Street to the westernmost limit under Wynyard Park and to its limits northerly and southerly, should not be regarded as one entire parcel of stratum, defined partly by the excavations made before 1932 and partly by the structures built into that excavation and consisting at some points of columns of air and soil with unlimited dimensions upwards and downwards. Upon this construction, which I have already declined to adopt, the stratum would at the date of the valuation in 1962 include the potentiality of building upon the stratum to the full permissible height so that the value would in a practical sense be tantamount to a fee simple in pure land. I should add that conformably to the limited construction I have adopted it would no doubt have been possible to create by appropriate instrument a stratum consisting of the layer of air above the second floor of the hotel building and such a stratum if defined by the improvements representing that floor could extend ad coelum, but the lease is not in terms a demise of any such area and it cannot be given that effect by any reasonable and necessary implication; it remains as I have already held a lease of land.

The second possibility to which I must give attention is that I should determine a value of the stratum interests alone and that land islands are to be excluded; I have stated the legal and practical reasons why I think this is inappropriate and would only repeat that if the improvements on the land islands must be assumed to be in existence the most practical approach might be one which entailed the demolition of those improvements

to give a clear vacant site the value of which would be close to the sum of $3,304,770 because it would include the central part of the site of such dimensions and extent that a single building of tower-like design could, under the City Council's floor-site index, have been constructed with a similar floor capacity to the buildings which in fact have been erected. It would, I think, as a matter of administration of the Local Government Act and the City Council's building regulations, be most unlikely that approval would be given to the construction of separate buildings on the land islands and those areas would therefore have only an incidental value as lending additional open space to a podium or plaza around the base of the tower block; and of course separate buildings could not be erected on the land islands unless and until the site had been legally subdivided along the boundaries of the land islands which are so irregularly or irrationally drawn that no Council would, I infer, be prepared to grant the necessary consents under Part XII and Part XI of the Local Government Act.

This reasoning it will be appreciated rejects any approach to valuation which requires a valuation of the stratum interests on the basis of an assumed vacant stratum and an estimate of the cost of erecting a building to link up with the sliced-off improvements on the land islands. I have already given other reasons why I do not think this is a rational basis for valuation, but if the only assumption lawfully open is that the land islands are in existence and have been built on, it would be reasonable to assume that the owner of the buildings on those islands would co-operate by allowing the use of a crane and other plant and the diversion of railway patrons along temporary ways so as to allow the completion of the buildings on the stratum as they now are and this would result in a substantial discount in the figure which Mr Millington said would be the added cost of constructing buildings on the stratum to connect up with those on the land islands. Cost, however, is not necessarily reflected in value and it seems quite improper to proceed on some fictional basis of the cost of constructing part of a building to link up with an existing part. Rather in terms of valuation it would be better to take the value of the whole and to determine the amount to be deducted for improvements by subtracting the value of the existing part from the valuation of the totality. But even on this basis a simple proportion of respective areas, such as the valuers took, may be as deceptive as one which proceeds upon the deduction of building costs because, as Mr Neal pointed out in evidence, the land islands of both the George Street and Carrington Street blocks include many of the services of the existing buildings such as lift-wells, stairs, escalators, plumbing and toilet facilities which are also the costliest parts. Not only, therefore, would the construction of buildings upon the stratum to link up with those on the land islands be less expensive than the average overall cost of the entire buildings but such parts would consist almost entirely of lettable space so as to make inapplicable the proportions of 62 per cent and 55 per cent of the whole taken by Mr Neal and Mr Woodley, respectively, as a basis for apportioning values; on a basis of lettable areas the proportions would be considerably greater and corresponding additions would have to be made

to the values reached by Mr Neal and Mr Woodley for the value of the strata between the land islands. Apart from the great complexity of this method of valuation, there is not sufficient information to enable me to find the value which would be appropriate upon these assumptions but that figure would in any case include so many imponderables as to be little more than a broad estimate.

Owing to the complexity of this matter I asked counsel to agree, if they could, on specific questions of law which I might be able to answer and counsel for the Valuer-General has prepared for this purpose and with the acquiescence of all other counsel a document entitled "Variables in Point of Law". I have attempted to cover the questions posed by these variables in the reasons for judgment I have just delivered and now set out my answers to those questions (the questions being underlined) as follows :

1. What is to be valued by the Court under s. 39 (6) or in part perhaps by the Valuer-General under s. 40 (3).

(a) Land—

No.

(b) Land and strata—

Yes, the land being the whole site between George Street and Carrington Street and the strata being the three areas under Carrington Street and Wynyard Park.

(c) Strata only—

No.

2. If land, the only variable in point of law would be whether the excavation is an improvement or a site improvement.

It is an improvement and a "site improvement" under the definition in s. 2 of the Act.

3. If land and strata, identify what is land and what is strata.

(See 1 (b) above)

and then the variables in point of law consist of:

(a) is the land to be taken as excavated or not—

(i) the land is to be taken to be excavated—see 2 above,

(ii) the strata are to be taken to be excavated and as consisting of the spaces within the walls, floors, and ceilings built into the excavations;

(b) does s. 7B involve the slicing of the existing building—

no;

(c) is the strata, so far as Carrington Street strata is concerned, as enclosed, or ad coelum—

it is not strata but land and has not been defined in a manner so as to be a stratum;

(d) are they capable of inclusion in one valuation—
yes;

(e) are they to be valued together—
yes;

(f) if land and strata cannot be valued together or included in one valuation can the Court fix the unimproved value of each or must the Court fix only the value of land or strata—
not applicable;

(g) if though both comprise the demised premises the Court must exercise one or the other i.e. itself value only one of them then:

(i) was there any issue before the Court as to whether the Valuer-General could value the other under s. 40 (3)—
yes;

(ii) if yes, has the Court jurisdiction in these proceedings to declare whether the Valuer-General can value the other under s. 40 (3)—
yes;

(iii) if yes to the two questions above, can the Valuer-General value the other under such subsection—
yes, if only because the valuation in 1962 purported to be a valuation of both and if this is erroneous it is open to the Court to substitute two valuations for one and, if it determines only one valuation, the Valuer-General can determine the other under s. 40 (3).

4. If the subject of valuation be only strata then the only variables in point of law would be 3 (b) and 3 (c) above—
not applicable.

The orders which I propose making, as I have previously indicated them but which I shall not make today, are to alter the valuations of which notice was given on 12th September, 1967, as follows:

(a) by deleting therefrom the reference to "stratum" or "strata";

(b) by substituting for the description the following: "land with a frontage to George Street on the east of 147 feet 9 inches, a frontage to Carrington Street on the west of 172 feet 11 inches, a southern boundary of 202 feet 3 inches, and an irregular northern boundary of 111 feet $5\frac{3}{8}$ inches westerly from George

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No. 1

Reasons for Judgment Else-Mitchell, J.

Street 24 feet 10⅝ inches northerly along the western side of Wynyard Lane and 90 feet 8¾ inches westerly to Carrington Street, together with spaces of 286 square feet, 280 square feet, and 15,786 square feet within walls, floors, and ceilings constructed in excavations under Carrington Street and Wynyard Park and as otherwise described on plans 'E', 'F', and 'G' annexed to the lease from the Commissioner for Railways to Wynyard Holdings Limited";

(c) by substituting for the unimproved value the sum of $3,304,770.

I am deferring the making of these orders until time has been taken by the parties to consider whether the improved and assessed annual values and the rating and taxing basis can be agreed upon between them. For this purpose and to hear argument on any other consequential matter, including costs, I stand the objections over until 9th June, 1969.

I certify that this and the preceding pages are a true copy of the reasons for judgment herein of the Hon. Mr Justice Else-Mitchell of the Land and Valuation Court of New South Wales.

Dated 14th May, 1969.

J. BLACKMAN, Associate to the Honourable Mr Justice Else-Mitchell

No. 2

CASE STATED BY THE LAND AND VALUATION COURT FOR THE DECISION OF THE SUPREME COURT THEREON IN PURSUANCE OF SECTION 17 OF THE LAND AND VALUATION COURT ACT, 1921 (AS AMENDED)

In the Supreme Court of New South Wales

No. 2

Case Stated

Pursuant to the requirement in writing of the abovenamed Wynyard Holdings Limited I do state the following case for the decision of the Supreme Court on the questions of law hereinafter set forth:

1. By Memorandum of Lease dated the 19th December, 1961, the Commissioner for Railways (hereinafter called "the Commissioner") leased certain premises therein described to Wynyard Holdings Limited (hereinafter called "the Company") for a term of ninety-eight years from the 1st December, 1961.

2. On the 22nd April, 1963, a Supplemental Deed of Lease was executed between the Commissioner and the Company whereby the Commissioner demised certain additional premises to the Company from the 20th August, 1962, to the 30th November, 2059.

3. The abovementioned lease and supplemental lease were tendered in the proceedings and marked Exhibit "D", and they are annexed hereto and marked "1".

4. On the 12th October, 1962, by Valuation No. 710 the Valuer-General made a valuation in respect of the premises comprised in the said leases and provided a rating and taxing basis under section 61A of the Valuation of Land Act, 1916, as at the 1st January, 1956. A copy of the Notice of such valuation forwarded to the Commissioner and the Company in respect of such valuation is annexed hereto and marked "2".

5. On the 16th October, 1962, by Valuation No. 4173 the Valuer-General made a valuation in respect of the said premises described in paragraph 1. hereof and gave notice thereof to the Commissioner and the Company. A copy thereof is annexed hereto and marked "3".

6. I found that the subject matter of the valuations in paragraphs 4. and 5. consisted of premises between George and Carrington Streets, Sydney demised or granted by the said leases and other

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areas and rights granted thereunder as briefly described in the Notices of Valuation and more accurately described as follows:

ALL THAT piece of land being the whole of the land comprised in Certificate of Title Volume 3108 Folio 191 AND ALL THOSE pieces of land under Common Law Title delineated in the plans annexed to the lease registered in the Registration of Deeds Office the Fifth day of January One thousand nine hundred and sixty-two and Numbered 438 Book 2595 and marked "A", "E", "F" and "G" and therein coloured red AND ALL THAT part of Wynyard Lane bounded on the north by the westerly prolongation of the northern boundary of the land one rood nine and one half perches (1r. 9½p.) in area shown on the said plan "A" and bounded on the south by a line joining the south western corner of the said land one rood nine and one half perches (1r. 9½p.) in area with the south eastern corner of the land one rood one and one quarter perches (1r. 1¼p.) in area shown on the said plan "A" excepting thereout the stratum of land twenty feet (20 feet) wide and twenty feet (20 feet) high as illustrated in the longitudinal sections on the said plan "A".

EXCEPTING thereout

(a) All that land or strata of land wholly comprised within the land held under Common Law Title shown coloured blue on plan "B" and the Elevations thereof shown uncoloured on plan "C" both annexed to the said lease;

(b) All that land or strata of land partly comprised within the land held under Common Law Title and the land described in Certificate of Title Volume 3108 Folio 191 shown coloured blue in the plan annexed to the said lease marked with the letter "J";

(c) All that land or strata of land wholly comprised within the land described in Certificate of Title Volume 3108 Folio 191 shown uncoloured in the Sectional Elevations thereof in Plan "D1" and coloured blue in plans "D2" and "D3" annexed to the said lease.

7. On the 5th December, 1962, the Company by its agents Messrs R. V. Dimond Pty Limited lodged objections with the Valuer-General to each of the abovementioned valuations claiming that the values assigned were too high, and that the situation, description and dimensions of the stratum were not correctly stated.

8. On the 12th September, 1967, the Valuer-General allowed the Company's objections to Valuation No. 710 under section 35

(1) of the said Act and altered such valuation and amended the Valuation Roll and issued notices of altered valuation. Notice thereof was given to the Company and the Commissioner and copies of such notices are annexed and marked "4" and "5" respectively.

9. On the 12th September, 1967, the Valuer-General allowed the Company's objections to Valuation No. 4173 under section 35 (1) of the said Act and altered such valuation and amended the Valuation Roll and issued notices of altered valuation. Notice thereof was given to the Company and the Commissioner and copies of such notices are annexed and marked "6" and "7" respectively. The descriptions contained in such notices "4", "5", "6" and "7" excluded from the areas leased as described in paragraph 6 hereof (in addition to the exclusions set forth in that paragraph) certain "land islands" being irregular areas located through the site as to which the lease contained no exclusion or reservation intruding at any level upon such areas and as to which areas the lessee therefore had a lease which extended usque ad coelum et ad inferos.

10. The Supplemental Lease referred to above, which purported to commence as from an earlier date, added, so far as is relevant 47 square feet to the area demised by the lease referred to in paragraph 1. hereof. Such area was not included in the first notices of valuation but was included in the area of 327 square feet at the Hunter Arcade level included in the Notices of Altered Valuation annexed hereto and marked "4", "5", "6" and "7".

11. On the 4th October, 1967, the Commissioner being dissatisfied with the Valuer-General's decision on the Company's objections to Valuations No. 710 and 4173 required the Valuer-General to refer such objections to a Valuation Board for hearing and determination pursuant to section 35 (2) of the said Act.

12. On the 17th November, 1967, the Council of the City of Sydney lodged objections with the Valuer-General pursuant to Section 31 of the said Act to the altered valuations made by the Valuer-General referred to in paragraphs 8. and 9. above claiming that those valuations were too low, that the area, dimensions or descriptions of the land were not correctly stated and that lands which should have been included in one valuation had been valued separately.

13. On the 6th February, 1968, the Valuer-General pursuant to section 35 (1) of the said Act disallowed the objections of the Council of the City of Sydney referred to above and gave notice accordingly.

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14. On the 6th February, 1968, the Council of the City of Sydney being dissatisfied with the Valuer-General's decision on its objections referred to above required the Valuer-General to refer such objections to a Valuation Board of Review for hearing and determination pursuant to section 35 (2) of the said Act.

15. On the 2nd May, 1968, the Valuation Board of Review at the request of all parties referred all such objections to this Court pursuant to the provisions of section 36M of the said Act.

16. On the 20th February, 1969, the Commissioner, with the consent of the Valuer-General, lodged objections with the Valuer-General to each of the abovementioned valuations Nos 710 and 4173 objecting for the following reasons:

    (i) that the values assigned in the said valuations were too low;

    (ii) that the area, dimensions or description of the land were not correctly stated;

    (iii) that lands which should be included in one valuation had been valued separately;

    (iv) that lands which should have been valued separately had been included in one valuation;

    (v) that the situation, description or dimensions of the stratum were not correctly stated;

    (vi) that strata which should be valued separately had been included in one valuation.

17. On the 21st February, 1969, the Valuer-General disallowed the Commissioner's said objections and the Commissioner required the Valuer-General to refer such objections to a Valuation Board of Review for hearing and determination pursuant to section 35 (2) of the said Act. The said objections were referred to the Valuation Board of Review and the Board of Review referred such objections to this Court pursuant to the provisions of section 36M of the said Act.

18. This matter came on for hearing before me on the following days :

    First day—3rd March, 1969.
    Second day—5th March, 1969.
    Third day—6th March, 1969.
    Fourth day—7th March, 1969.
    Fifth day—10th March, 1969.
    Sixth day—11th March, 1969.
    Seventh day—12th March, 1969.
    Eighth day—13th March, 1969.
    Ninth day—14th March, 1969.
    Tenth day—17th March, 1969.

Eleventh day—18h March, 1969.
Twelfth day—19th March, 1969.
Thirteenth day—20th March, 1969.
Fourteenth day—24th March, 1969.
Fifteenth day—25th March, 1969.
Sixteenth day—26th March, 1969.
Seventeenth day—27th March, 1969.

19. I announced my reasons for judgment in this matter on the 14th May, 1969, and indicated therein the orders which I proposed to make, but I deferred the making of formal orders until the 9th June, 1969, and, in the case of my order as to costs, the 11th June, 1969.

20. On the 9th June, 1969 (and, so far as relates to the order for costs, the 11th June, 1969), I made the following orders :

"THAT the valuations numbered 710 and 4173 issued by the Valuer-General on the 12th day of October, 1962, pursuant to section 61A of the Valuation of Land Act (as amended) be and the same are hereby altered as follows :

(a) by deleting therefrom the reference to 'stratum' or 'strata';

(b) by substituting for the description the following :

'Land with a frontage to George Street on the east of 147 feet 9 inches, a frontage to Carrington Street on the west of 172 feet 11 inches, a southern boundary of 202 feet 3 inches, and an irregular northern boundary of 111 feet $5\frac{3}{8}$ inches westerly from George Street 24 feet $10\frac{5}{8}$ inches northerly along the western side of Wynyard Lane and 90 feet $8\frac{3}{4}$ inches westerly to Carrington Street, together with spaces of 286 square feet, 280 square feet, and 15,786 square feet within walls, floors, and ceilings constructed in excavations under Carrington Street and Wynyard Park and as otherwise described on plans 'E', 'F' and 'G' annexed to the lease from the Commissioner for Railways to Wynyard Holdings Limited';

(c) by substituting for the unimproved value the sum of $3,304,770.00;

(d) by substituting for the improved value the sum of $7,750,000.00;

(e) by substituting for the assessed annual value the sum of $387,500.00;

(f) by substituting for the rating and taxing basis as of 1st January 1956, the sum of $1,718,486.00.

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AND THAT the defendant Wynyard Holdings Limited DO PAY one-half of the costs of the Commissioner for Railways and one-half of the costs of the Council of the City of Sydney on the highest scale and that the defendant The Valuer-General do pay its own costs AND FURTHER THAT it be referred to the Registrar to tax and certify the costs of the said Commissioner for Railways and Council of the City of Sydney in this suit."

21. (a) The subject property forms part of a large area of land between George Street and York Street in the City of Sydney including the present Wynyard Park, Carrington Street, and Wynyard Lane, which was excavated prior to 1932 to a depth of 40 feet or more in order to enable the construction of the Wynyard Railway Station with platforms, concourses, offices, conveniences, and access ways to and from George Street and York Street in the course of the construction of the underground railway system for the City of Sydney. After the railway works were completed in 1932 the surface of the land was made good, York Street and Carrington Street were restored to traffic-able use, and Wynyard Park was converted into a garden area. At a later date the surface of Wynyard Lane, which runs parallel to George Street between that Street and Carrington Street, was also restored so as to be capable of use by traffic, but section 25 of the Transport (Division of Functions) Act, 1932, authorized the construction by the Commissioner for Railways of buildings under that lane and not less than 20 feet above it so as to leave room for the passage of traffic. Beneath the surface and adjacent to the platforms and other railway works the Commissioner for Railways constructed concourses and areas parts of which have been let to commercial tenants as well as being used for access ways and incidental railway purposes, and provided passageways to George Street to enable members of the public to have access to and from the railway station and concourses.

(b) The area between Carrington Street and George Street, excluding the surface of Wynyard Lane, the space 20 feet above it, and the passageways giving access between George Street and the railway station, had been the subject of a lease granted by the Commissioner for Railways in 1927, and in 1941 a further lease was granted of this area for the construction of an hotel. This lease had become vested in the Company, and on the 19th December, 1961, a new lease of areas of land in the vicinity of Wyn-

yard railway station was granted by the Commissioner to the Company and the old lease of 1941 was surrendered.

(c) The said lease, which is that referred to in paragraph 1. above, was for a term of ninety-eight years from the 1st December, 1961, and demised the following:

(i) a parcel of land under the Real Property Act, 1900, containing $16\frac{1}{2}$ perches having a frontage to Carrington Street of 49 feet $6\frac{1}{2}$ inches and a depth to Wynyard Lane of 90 feet $8\frac{3}{4}$ inches;

(ii) a parcel of land under Common Law Title containing 1 rood $1\frac{1}{2}$ perches having a frontage to Carrington Street of 123 feet $4\frac{5}{8}$ inches and a depth to Wynyard Lane of 90 feet $9\frac{1}{8}$ inches and adjoining the land referred to in (i) above ;

(iii) a parcel of land under Common Law Title containing 1 rood $9\frac{1}{2}$ perches having a frontage to George Street of 147 feet $9\frac{1}{8}$ inches and a depth to Wynyard Lane of 91 feet $5\frac{5}{8}$ inches;

(iv) a parcel of land under Common Law Title comprising Wynyard Lane between the prolongation of the above excepting thereout a stratum 20 feet wide and 20 feet high above the surface of that lane;

(v) two areas of land under Common Law Title containing 286 and 280 square feet respectively under the eastern footpath of Carrington Street adjoining the land referred to in (ii) above;

(vi) an area of land under Common Law Title containing 15,786 square feet under Wynyard Park and Carrington Street above the main concourse of Wynyard station, with a variable height and adjoining the land referred to in (ii) above.

The demise was subject to certain exceptions and reservations. The exceptions comprised, in addition to the surface of Wynyard Lane and a space 20 feet above it, the passageways to Wynyard railway station from George Street and Hunter Street, part of the lower basement under the lands referred to in (iii) and (iv) above, and various small spaces and areas above and below original ground level which represent the sites of a lift-well, some air ducts, and incidental plant. The lease reserved to the Commissioner the right to construct, maintain, and use these areas and spaces for a lift-well and ventilating shafts and for the installation of access and passage over other areas, and also granted to the necessary plant, as well as various incidental rights of

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the Company as lessee and its sub-lessees and invitees the right to use the passageways for pedestrian use and the lift at certain times for the transport of goods to specified parts of the demised premises.

(d) The Company commenced the construction on the subject property of a large office block and a residential hotel, the former occupying the George Street frontage back to Wynyard Lane and the latter having a frontage to Carrington Street and extending over Wynyard Lane into parts of the office block; the George Street office block (which is now known as Wynyard House) was built around and over the sloping passageways to Wynyard railway station and there was provided a new passageway or arcade from George Street to the Carrington Street frontage above Wynyard Lane; shops of various sorts and some hotel facilities and bars were built with frontages to these passageways so that they have become shopping arcades. The residential hotel occupying the Carrington Street frontage now known as the Menzies Hotel was so designed that vehicular access could be had from Wynyard Lane to the demised area below Wynyard Park and Carrington Street ((v) above) which was fitted out as a parking area to accommodate motor vehicles and to which access could also be had by the lift system in the hotel.

(e) During the month of October, 1962, the construction of Wynyard House had been substantially completed and was ready for occupation, but the Menzies Hotel had been built only to the top of the functions room, which was the floor at the first level of bedrooms. A building progress report in respect of the subject property as at the 15th October, 1962, was tendered in the proceedings and marked Exhibit "F". A copy of the said Exhibit is annexed hereto and marked "8". A sectional sketch of the premises upon the subject site, as completed, was tendered and marked Exhibit "M". A true copy of the said Exhibit is annexed hereto and marked "9".

22. A documentary history of the subject site was tendered during the proceedings and marked Exhibit "P". A true copy of the said Exhibit is annexed hereto and marked "10".

23. It was contended by the Company that the subject matter which fell to be valued by the Valuer-General under the provisions of the said Act was partly land within the meaning of the said Act and partly stratum within the meaning of the said Act. A plan showing what was contended by the Company to be a representation of the areas of land and stratum respectively created by the demise to it of the subject property was tendered

and marked Part Exhibit "T". A true copy of the said plan is annexed hereto and marked "11".

24. It was argued on behalf of the Company that, consistently with the decisions in *Hurstville Super Centre* v. *The Valuer-General,* whatever may have been the position before 1961, the amendments made by Act No. 66 in that year created a dichotomy so that thenceforth a determination had to be made of what was true land in the sense of usque ad coelum et ad inferos which could be valued as such under the original provisions of the Valuation of Land Act on the one hand, and everything else which, because it was less than usque ad coelum et ad inferos, must be regarded (if ratable or taxable) as stratum and valued under the new provisions added in 1961.

25. It was further argued by the Company that in Valuations Nos 710 and 4173 the Valuer-General had purported to, and had in fact, and in law, made valuations of "strata" or at least of property which was predominantly stratum.

26. It was further argued by the Company that on the true construction of the said Act land and stratum cannot be valued together. On that basis it was contended that the areas of land usque ad coelum et ad inferos which were dealt with in the said valuations should be excised therefrom and it was apparently on the basis of an acceptance of that contention that the Valuer-General had in fact altered the issued valuations to which the objections the subject of these proceedings were taken.

27. On the other hand, it was contended by the Commissioner for Railways and the Council of the City of Sydney that :

(a) the whole of the premises demised to the Company under the lease and supplemental lease referred to above was land and could and should be valued as such by the Valuer-General;

(b) alternatively, that the whole of the said premises with the exception of the areas identified as "E", "F" and "G" in the said lease was land and could and should be valued as such by the Valuer-General;

(c) none of the portions of the demised premises said by the Company to be stratum was in fact stratum within the meaning of the said Act;

(d) if, contrary to the above submission, the exclusion of any part of the land from the demise brought into existence a stratum, that was a stratum ad coelum and could and should be valued as such by the Valuer-General;

(e) if so, the whole of the said demise could and should be valued by the Valuer-General as stratum or, alternatively, as land and stratum ad coelum;

(f) if the subject matter of the valuation consisted of land and stratum they could and should be valued together and included in one valuation;

(g) this Court should value the whole of the said premises demised to the Company under the lease and supplemental lease in one valuation.

28. I rejected the contention that there was an inflexible dichotomy between land and stratum. I held that the amendments made by Act No. 66 of 1961 were not intended to make new and more complex provisions with respect to the numerous situations in which interests in land less than the entirety had previously been valued alone or separately from the residue and in which valuations of such interests were combined with valuations of the entirety of adjoining land. I held that all the amendments were concerned to do was to enable unimproved values to be deduced of areas which had been held to be incapable of such valuation in the *Lawrence Dry Cleaners Case*, 1961, 6 L.G.R.A. 237.

29. I held that a valuation under sections 7A, 7B or 7C is to be made only of such stratum interests of which it would otherwise be impossible to deduce a value for the purposes of the imposition of a rate or tax, this being the essential limitation.

30. I also came to the conclusion that the property to be valued by me in these proceedings, save for the three areas under Carrington Street and Wynyard Park (which I held to be stratum) was land and not stratum within the meaning of the Valuation of Land Act. In this connection I held:

(a) that property may be valued as land under the Act notwithstanding that it is defined by horizontal as well as vertical boundaries;

(b) that property may not be valued as stratum under sections 7A, 7B and 7C of the said Act unless it is an occupiable space within, upon, or under improvement.

I held that the three areas under Carrington Street and Wynyard Park were "ratable or taxable" under the Local Government Act.

31. I expressed the opinion that the propriety of making a valuation of some less interest than the physical entirety of a parcel of land or of several parcels of land together or of a single valuation of separate interests therein is left in the first instance to the Valuer-General but subject to the right which section 34 confers to have an objection dealt with by a Valuation Board of Review and the right of appeal to this Court. I concluded, therefore, that the Valuer-General has a primary discretion about these

matters and that the selection of the subject matter of a valuation and the separation or amalgamation for valuation purposes of different parts of or interests in land can be undertaken by him at his discretion subject to the mandatory provisions of sections 26 and 27 and to the rights of objection before a Valuation Board of Review and appeal to this Court.

32. I held that it was proper to look at the instrument by which any so-called stratum is created if only because a stratum results from the act or agreement of parties. This instrument in the present case was the lease between the Commissioner and the Company which effects several demises of the different parcels or parts of land. These demises comprise, inter alia, the whole of the land between George Street and Carrington Street, subject to certain exceptions and reservations in favour of the Commissioner, and with the benefit of certain additional rights already mentioned. I accordingly held that the demise to the Company of the land between George Street and Carrington Street (including Wynyard Lane) referred to in the said Memorandum of Lease did not create a stratum (as was submitted by the Company) but was a lease of the entirety of the land subject to exceptions and reservations. I therefore held that this portion of the demise should be valued under sections 5, 6 and 7 of the said Act as land.

33. In approaching the construction of the Valuation of Land Act including the amendments made in 1961 and in the application of the Act to the valuation of the demised premises I took into account the practical necessities surrounding the fulfilment by the Valuer-General of his functions and what I considered to be the unreality and impracticability of the conclusions contended for by the Company. I expressed the view that valuation is a practical matter and should be carried out in the light of the opinions of those who are skilled appraisers and assessors, and that to import into the valuation process by way of assumption or otherwise elements of impossibility or serious impracticability would be tantamount to denying an effective operation to statutory provisions which require the making of valuations reflecting a market demand. For that reason I was prepared to treat land and stratum as capable of being valued together where practical considerations commend that course.

34. A large volume of evidence was given by a number of valuers of wide experience practising in the City of Sydney (including one on the staff of the Valuer-General) who attempted to assign a value to the demised premises upon different bases. One method was to assign a value as land to the whole of the area between George Street and Carrington Street referred to in the said lease

and then to bring into account the deductions (if any) which should be made from this amount by reason of the exceptions and reservations contained in the lease. Another method adopted by some of the valuers was to assume the construction within, upon or under the area demised of shops, commercial premises, hotel and other constructions, to calculate a value for occupied space on a capitalization basis and to relate the total to the cost of construction of appropriate premises. A third method which was advanced by the valuer called on behalf of the Company, was to value separately as land the "land islands" referred to in paragraph 9. hereof (being those parts of the whole site into which there were no intrusions of stratum at any level) with all their disabilities. This involved the assumption that the buildings erected upon the residue of the premises would be valued as stratum were already in existence and that there would be constructed within the land islands a building or buildings to link up with those already erected on the strata. The valuation took into account or was based on the cost of building the buildings within the land islands and included special allowances for the difficulty of such construction in linking up the building. That valuer separately valued as stratum on the basis of lettable space the remainder of the area and within the valuation of the stratum took into account amongst other things the cost that would be entailed of building upon areas of peculiar shape and location with the disabilities that were involved in the location of construction equipment, whilst preserving the access to the other parts from the concourses and the access between the railway concourse on the one hand and George and Hunter Streets on the other and while taking into account the additional cost of linking up the improvements to be inserted.

35. The demarcation lines between those portions of the demised premises between George and Carrington Streets alleged by the Company to be stratum (depicted in the said plan annexed hereto and marked "11") and the land islands did not correspond with any features physically dividing one part of the improvements from another or providing any physically identifiable criterion marking a separation of ownership or occupation, but indiscriminately passed through structural members, fabric and services of the building. Conformably with the principles expressed in paragraph 33 above, I declined to determine the valuation of the demised premises upon the basis of such a demarcation as adopted by the Company's valuer; I found as a fact that it involved elements of impossibility or serious impracticability. I held that the most appropriate method was to value the whole of the demised premises between George and Carrington Streets as land usque ad coelum et ad inferos deduct-

ing therefrom such sum (if any) as, on the evidence of one or more of the valuers, represented the reduction in value resulting from the exceptions and reservations in the lease. I held, alternatively, that a similar result would be reached if the demised premises were valued wholly as stratum. I also held that even if the demised premises were predominantly stratum (excluding the land islands) all the stratum may be valued together and that such a valuation could include also areas of true land (the land islands) because they were not separate parcels in any sense and as a practical matter should be valued along with the strata surrounding and adjoining them.

36. I declined to enter upon any assessment of the value upon the basis of such a demarcation as adopted by the Company's valuer because of the difficulties involved. Apart from the great complexity of this method of valuation, there was not sufficient information to enable me to find the value which would be appropriate upon these assumptions, but that figure would in any case include so many imponderables as to be little more than a broad estimate.

37. I concluded that land and strata may be included in one valuation under the said Act where they physically adjoin or are in the one ownership.

38. I found it established on the evidence that the subject matter of the 1962 valuations was land and that on the proper construction of the notices of valuation marked "2" and "3" the valuation then made was of land notwithstanding the use thereon of the word "stratum" or "strata". I reached my decision as to the proper valuation of the demised premises on the basis that I was entitled to delete from the Valuer-General's valuation referred to above the references to "stratum" or "strata" therein, and to substitute for the unimproved value of the property the subject of such valuations one different unimproved value covering the whole of the demised premises, notwithstanding the form of the valuations in the first place.

39. Owing to the complexity of the matter I asked Counsel to agree, if they could, on specific questions of law which I might be able to answer in my reasons for judgment and Counsel for the Valuer-General prepared for this purpose a document entitled "Variables in point of law". One of the possibilities adverted to in that document was the possibility that if land and stratum could not be valued together, and it was necessary to excise part of the subject premises from the valuations in question the Court had jurisdiction in these proceedings to declare that the Valuer-General could value himself the part which was not valued by

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the Court in these proceedings. Counsel for the Company submitted that there was no issue before the Court on that question, but, contrary to that contention, I held that there was such an issue before the Court and that if the question had arisen the Valuer-General could have valued any portion of the subject premises not valued in these proceedings.

40. One further matter which had to be taken into account in my actual valuation of the subject property was the value, if any, to be attributed to the excavation of the site between George Street and Carrington Street. It was submitted in the course of the proceedings that the excavation was not a "site improvement" within the definition of section 2 of the said Act for the purpose of reaching an unimproved value under section 6. I heard argument on this matter and concluded that the excavation was a "site improvement". I took the view that an excavation of land will in a given case be a site improvement if it in fact operates to improve the land.

41. In the course of the proceedings it appeared that an officer of the Valuer-General's Department had prepared certain reports for the Valuer-General relating to the (valuation) valuation of the subject property consequent upon the original objections made by the Company to the initial valuations made by the Valuer-General. Counsel appearing for the Company called for those reports. Counsel appearing for the Valuer-General stated that it had been arranged that the reports would be in Court and that they were in fact in Court but he submitted that they were not admissible in the proceedings and that he was not bound to produce them pursuant to the call. Counsel for the Company asked that they be produced as on subpoena duces tecum and that he be granted access to them and stated that he would be seeking to tender them. Counsel for the Valuer-General did not claim privilege for the documents. Counsel for the Company further stated that he would wish to use the documents for the purposes of cross-examining the witness as to value called by the Valuer-General in the proceedings and for tendering evidence as to the basis upon which the valuations the subject of the proceedings were made. In fact the officer of the Valuer-General's Department who had prepared the reports in question was no longer in that department and was not called as a witness in the proceedings and the only witness called by the Valuer-General in the proceedings was a person who had nothing to do with the preparation of the valuations the subject of the proceedings.

42. The documents referred to in paragraph 41 above were in fact produced to the Court by Counsel for the Valuer-General and

Counsel for the Company sought access to them. I declined access, holding that evidence as to the basis upon which the Valuer-General made the altered valuations the subject of these proceedings was inadmissible and that I would not permit the witness called by the Valuer-General as to the value of the subject property to be asked questions in cross-examination founded upon the basis upon which the Valuer-General upon the report of an officer not the witness had made the altered valuations the subject of these proceedings. I also declined to accede to the application on the ground that section 11 of the Valuation of Land Act protects the record of the Valuer-General from production in the circumstances in which it was sought to have access to the documents in this case.

The questions of law stated as aforesaid for the decision of the Supreme Court are:

A. Was I in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street?

B. Was I in error in valuing as stratum and not as land those portions of the demised premises below Carrington Street and that portion below Carrington Street and Wynyard Park respectively identified as "E", "F" and "G" in the said lease?

C. If I was in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street—

(i) should the whole have been valued as stratum;

(ii) should some part (and, if so, what part) have been valued as land;

(iii) should some part (and, if so, what part) have been valued as stratum?

D. If part of the demised premises was to be valued as land and part as stratum, was I in error in including the entirety of the demised premises in one valuation?

E. Where land or any interest in land is partly defined by a horizontal boundary—

(a) must the entire property be valued, if at all, as stratum; or

(b) must the entire property, if not falling within the definition of stratum, be valued under sections 5, 6 and 7 of the Act; or

(c) is it obligatory to value as stratum that part which is defined or definable by a horizontal boundary; or

(d) has the Valuer-General discretion to value the entirety either under sections 7A, 7B, and 7C or under sections 5, 6 and 7?

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F. Was I in error in holding that property may not be valued as stratum under sections 7A, 7B and 7C of the said Act unless it is defined by reference to improvements, that is, in holding that it must be an occupiable space within, upon or under improvements?

G. If a subject treated by the Valuer-General on the face of the Notice of Valuation as wholly land or wholly stratum be found to be partly land and partly stratum—

(a) is that valuation capable of correction on objection or appeal so as to value in one valuation both land and stratum if in one ownership and contiguous; or

(b) must the Valuation Board of Review or the Court excise from the valuation either the land or the stratum; or

(c) is such valuation wholly or partly inoperative?

H. Was I in error in law in proceeding upon the basis that, as a matter of construction, the valuations referred to the Court in these proceedings were valuations of land?

I. If the property the subject of the abovementioned valuations 710 and 4173 included both land and stratum and the Court had to excise from the said valuations either the land or the stratum valued, was I in error in holding—

(a) That there was an issue before the Court as to whether, if the Court could in these proceedings value only the land or the stratum the Valuer-General could value the other under section 40 (3) of the said Act;

(b) that the Court had jurisdiction in these proceedings to declare whether the Valuer-General could value the other under section 40 (3);

(c) that the Valuer-General could value the other under section 40 (3)?

J. Was I in error in law in holding that an excavation of land in the situation of the subject property is a site improvement within the definition of section 2 of the said Act?

K. Was I in error in holding inadmissible evidence as to the basis of a departmental valuation report to the Valuer-General where the valuation figure recommended in such report has been adopted by the Valuer-General in valuations the subject of obligations in proceedings before the Court?

L. Was I in error in law in holding that it is not open to a party to proceedings before this Court on appeal or reference from a Valuation Board of Review to cross-examine a witness called as to the value of a subject property by the Valuer-General as

to the basis upon which another officer of the Valuer-General had recommended that valuation be made where the Valuer-General had adopted in making valuations of the subject property the valuation figure recommended by that other officer?

M. Was I in error in law in holding that section 11 of the said Act protects the records of the Valuer-General from production on all or on call as on subpoena duces tecum or on subpoena duces tecum in proceedings before the Land and Valuation Court concerning an objection to the Valuer-General's valuation of a property?

Dated this twenty-fifth day of March, 1970.

R. ELSE-MITCHELL,

Additional Judge of the Land and Valuation Court.

No. 3

Reasons for Judgment of His Honour Mr Justice Asprey

In the Supreme Court of New South Wales Court of Appeal

No. 3

Reasons for Judgment Asprey, J.

ASPREY, J.A.: This is a case stated by Else-Mitchell, J., on 25th March, 1970, pursuant to section 17 of the Land and Valuation Court Act, 1921–1961. The case was stated at the request of the parties but not every party joined in the request to include each one of the questions stated in the case for the decision of this Court. The case relates to objections made to the valuations referred to respectively in notice of Valuation Nos 710 and 4173. The case stated is too lengthy a document with its various annexures to incorporate herein.

The submitted questions of law will largely fall to be answered by the determination of a number of matters which are fundamental to the construction of the Valuation of Land Act, 1916–1965. This is a task in which in previous cases Courts have found themselves confronted with some difficulties. I commence with the word "land" which is not defined by the Act but is constantly used throughout it. "Land" is a technical word when used in such a statute as the Valuation of Land Act and prima facie should be construed as such (Lord Advocate v. Stewart (1902) A.C. 344 at p. 356; Deputy Federal Commissioner of Land Tax v. Hindmarsh 14 C.L.R. 334 at p. 340). Apart from statutory definitions and apart from any interpretations which ought to be given to the word by reason of the context in which it happens to be found, the legal signification of the word "land" has an indefinite extent upwards and downwards and includes "not merely the surface, but all the land down to the centre of the earth and up to the heavens" (Poutney v. Clayton 11 Q.B.D. 820 per Bowen, L.J., at p. 839; Wilson Syndicate Conveyance, Wilson v. Shorrock (1938) 3 All E.R. 599 at p. 602; Broom's Legal Maxims 10th Edn pp. 257, 259; Colon Peaks Mining Co. v. Wollondilly Shire Council 13 C.L.R. 438 at p. 455). By section 21 (e) of the Interpretation Act 1897, unless the contrary intention appears, the word "land" shall include messuages, tenements, and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein". When, however, the word "land" is used in the Valuation of Land Act it appears to me that the context of the Act and the purposes which the Act was passed to achieve indicate a contrary intention. Both the title and the context of the Act show that the object of the Act was to provide methods for the determination of values in respect of certain lands for rating and taxing purposes and I am of the opinion that the ordinary legal signification of "land" best harmonises with the object which the Legislature had in

view in its enactment in the form in which the Valuation of Land Act stood prior to its amendment in 1961.

I turn to the word "stratum" and that also was a word which originally and until the passing of the Valuation of Land and Local Government (Amendment) Act, 1961, which came into force on 22nd December, 1961 (hereinafter referred to as "the 1961 Act") was not defined in the Valuation of Land Act. In its ordinary signification "stratum" has the meaning of a quantity of a substance or material spread over an horizontal or nearly horizontal surface to a more or less uniform thickness. It could be applied to soil, rock, the atmosphere, etc. By the 1961 Act, the opening words of the title of which described it as "an Act to provide for the valuation of strata", a definition of "stratum" was inserted in section 4 (1) as follows:

> " 'Stratum' means a part of land consisting of a space or layer below, on, or above the surface of the land, or partly below and partly above the surface of the land, defined or definable by reference to improvements or otherwise, whether some of the dimensions of the space or layer are unlimited or whether all the dimensions are limited; but refers only to a stratum ratable or taxable under any Act; and 'strata' is the plural of stratum."

The 1961 Act also made a number of consequential changes with reference to stratum which now appear in numerous places throughout the Act. Many of the amendments to the Valuation of Land Act effected by the 1961 Act were undoubtedly brought about by the decision of the Full Court in Commissioner for Railways v. Valuer-General 62 S.R. 28 (commonly referred to as the Lawrence Dry Cleaners Case). In that case the Commissioner, having acquired certain land, excavated it and constructed a multi-storey building which was partly within the excavation and partly above it. The Commissioner leased part of the upper of two floors within the excavation to a dry cleaning company for private business purposes. The Valuer-General purported to make a separate valuation of the unimproved value of the space occupied by the company. It was held on 3rd May, 1961, that that space (or stratum) which was itself an improvement or part of a larger improvement could not have an unimproved value under the Valuation of Land Act, 1916–1951, and therefore the Valuer-General was not authorized to make the valuation. The difficulties in the way of the Valuer-General carrying out the requirement of section 14 in the form in which the Valuation of Land Act then stood are discussed in some detail in the report of that case and I need not repeat them here.

The next question which arises is whether, by virtue of the amendments effected to the Valuation of Land Act by the 1961 Act, the word "land" could be said to have changed in meaning from its ordinary legal signification in the sense to which I have referred above. We were not referred to any authority which would lead me to that conclusion. No doubt that result could have been achieved by the addition to the Act of some special definition

or by a very marked change of the context in which the word "land" appears in the legislation after the 1961 amendments. The word "land" now appears in numerous instances throughout the Act both in the phraseology of "land or stratum" and "land and strata" but no definition of "land" yet appears in the Act. Some significance may be attached to the fact that, although in the special definition of " stratum" it is described as part of land, the 1961 Act did not insert any definition of land itself. When "land" is given its ordinary legal meaning it includes a layer or stratum, for the moment not using here the word stratum in the special sense of the definition now provided in section 4 (1). That definition of "stratum" in section 4 (1), as will be seen from what I have quoted above, commences with the words "means a part of land consisting of a space or layer below, on, or above the surface of the land," etc. If that definition of "stratum" had omitted the words "but refers only to a stratum ratable or taxable under any Act" the ordinary legal signification of the word "land" could have comprehended a stratum as described in the earlier part of the definition. However, when the Act uses the words "stratum" or "strata", whether or not in conjunction with the word "land", it is employing those two words in the sense of the special definition in section 4 (1). Although that definition describes "stratum" as "part of land" that is only the commencement point of the definition. To qualify as a "stratum" so defined the space or layer must not only be a part of land but must also be defined or definable as mentioned in the definition; and there is a third and important quality which it must possess, namely, it must be ratable or taxable under some Act and you must look to some statute other than the Valuation of Land Act to see whether this quality attaches to the space or layer which otherwise falls within the earlier portions of the definition. It is this attribute of ratability or taxability which removes a stratum as defined in section 4 (1) from the concept of land in its ordinary legal signification and gives it a special place of its own in the Valuation of Land Act.

Prior to 1961 "land" in its ordinary legal meaning could be valued in accordance with sections 5, 6 and 7 of the Act and certain parts of land could be so valued (see section 28 and Commissioner for Railways v. Valuer-General (supra) per Hardie, J. at p. 37) but those parts of land which were themselves improvements or parts of a larger improvement could not be given an unimproved value (see before). The amendments in 1961 were intended to remedy that situation. Hence "stratum" as defined in section 4 (1), although intrinsically a part of land, is made by the definition a special concept for the purposes of the Act. The scheme and purpose of Part II of the Valuation of Land Act carry with them an artificial conception of "improved value" and "unimproved value" which are special terms and have a special statutory meaning allotted to them in the case of land by sections 5 and 6 and have a special statutory meaning separately allotted in the case of stratum as defined in section 4 (1) by sections 7A and 7B (Gollan v. Randwick Municipal Council (1961) A.C. 82 at pp. 101–102). "Stratum" as

defined is a special concept of a space or layer for rating and taxing purposes but it does not bear upon the meaning of the word land. In the result I am clearly of the opinion that "land" in the Act as it now stands bears its ordinary legal signification as it did before the 1961 Act.

Finally, it should be remembered that, although the contex of an Act may compel one to assign different meanings to the same word where it appears in different parts of the Act, the primary rule, and one that should not be readily displaced, is that the same meaning should be given to the same word wherever it appears in any Act of Parliament (In re National Savings Bank Association L.R. 1 Ch. App. 547 per Turner, L.J., at pp. 549–550; Courtauld v. Legh L.R. 4 Ex. 126 at p. 130; Ministry of Health v. Fox (1950) Ch. 399 at pp. 378–379; Slazengers (Australia) Pty Ltd v. Burnett (1951) A.C. 13 at p. 21; Inland Revenue Commissioners v. Henry Ansbacher & Co. (1963) A.C. 191 at p. 206–207). I think that the word "land" bears its ordinary legal signification throughout the Act.

Section 4 (1) defines "stratum" as meaning "a part of land consisting of a space or layer . . . defined or definable by reference to improvements or otherwise". The phrase "improvements or otherwise" itself is given no definition by the Act. The word "improvements", I think, means, when read in the context of the Act, any structure or any other physical feature which is in or upon the land which in turn contains the stratum. I agree, as was stated in Hurstville Super Centre Ltd. v. Valuer-General (67 S.R. 110 at pp. 122, 126) that the words "or otherwise" must be given a meaning allied with "improvements", that is to say, something of a physical kind or nature. The definition of "stratum", in my view, gives no support to the argument that a stratum is ascertainable by looking at a draughtsman's plans or by such terminology as may be found in a specification. A stratum comes into existence when improvements or the like are physically effected to and upon the subject land.

Now, what was the policy in enacting the Act in the form in which it stood prior to the 1961 Act? The substantial policy of the Act was a twofold one. Firstly, it provided a scheme for the valuation of land for rating and taxing purposes by the rating and taxing authorities mentioned in section 47 (see Gollan v. Randwick Municipal Council (supra) at pp. 95, 101–102). The duty of the Valuer-General to prepare valuation rolls is contained in section 16 and the uses of the valuation lists to be furnished by the Valuer-General to the authorities for this purpose are set forth in Part V of the Act. The correlation of Part V of the Act with the various rating and taxing authorities may, by way of example, be seen in sections 132–139 of the Local Government Act, 1919 (as amended). Secondly, the Act provided a method for the calculation of duty upon the value of any estate or interest in land for the purposes of the Stamp Duties Act, 1920 (as amended), for the purposes of valuing land in connection with loans and investments by public offices and departments and for a variety of other purposes which are

referred to in the sections comprised in Part VI of the Act (Broken Hill Pty Ltd v. Valuer-General (1970) A.C. 627).

The amendments effected by the 1961 Act were not intended to abrogate the two branches of the Act's policy to which I have just referred but to enlarge them by enabling a space or layer of a particular defined character to be valued for the purposes of the rating and taxing authorities as a "stratum". The amendments enabled the Valuer-General to value stratum as defined in section 4 (1) as well as land (see sections 19, 19A, 20 (2)) and to insert the appropriate particulars of all strata as well as all land on the valuation rolls (see section 16 (2)) and on the valuation lists forwarded by him to the rating and taxing authorities (see especially sections 48, 51). The amendments preserved the unimproved value of land for rating purposes (section 58 (1) and (4)) but introduced the unimproved value of a stratum for the same purposes (section 58A (1) and (4)) and by appropriate amendments to sections 59 and 60 enabled the improved and assessed annual values of strata to be made whilst preserving the improved and the assessed annual values of land. Either "land" or "stratum" could be utilized by a rating or taxing authority as its rating or taxing bases (sections 61, 62). A supplementary list (section 49) could be furnished by the Valuer-General to the authorities of land or stratum, either of which could be rated or taxed, and objections could be made to the rating or taxing of either the land or the stratum on the supplementary list as if it were a valuation (section 61A). Corresponding amendments were effected by the 1961 Act to Part VI of the Act.

The general definition sections contained in Part I of the Act were also amended. In addition to inserting in section 4 (1) the definition of "stratum" to which I have earlier referred, the definitions of the words "lease", "rent", and "owner" were amended to relate those words to "stratum" in addition to "land". Sections 7A, 7B, and 7C were added to the Act so as to correspond respectively with sections 5, 6, and 7 and to provide for the improved, the unimproved, and the assessed annual value of stratum as well as land. The valuation rolls were to contain, in addition to particulars of the ownership, etc., of any estate in land, particulars of the ownership and the interests of lessors and lessees in a stratum (sections 15, 16 (2), and 17). Attention may be drawn to some other sections inserted by way of amendment which correspond with each other in that they bear respectively upon land and upon strata—compare sections 21 (a) with 21 (2), section 27 (1) with section 27A (1), section 26 (2) with section 27A (2), section 28 with section 28A, section 34 (1) with section 34 (2), and section 58 with section 58A.

Some amendments which were made to the Local Government Act by the 1961 Act may also be noted (see sections 8 and 10 of the 1961 Act). Section 8 of the 1961 Act is important because it extensively amended Schedule Three of the Local Government Act (see especially clauses 2A, 18

(3) and (3A)) and section 10 validated any valuation of a stratum ratable or taxable under any Act made or purporting to have been made before the commencement of the 1961 Act. Both the Valuation of Land Act and the Local Government Act were closely correlated the one with the other prior to the 1961 Act for rating purposes (see the sections contained in Part VII, Division 2, of the Local Government Act commencing with section 133 and Schedule 3 of that Act; and see Gollan's Case (supra)). As the 1961 Act effected at one and the same time amendments to each statute upon the same subject matter, I think that in respect of that subject matter the two statutes are in pari materia and that it is legitimate to look at the operation and effect of the amendments in each statute in order to ascertain the intention of the Legislature in respect of the subject matter in what is, in effect, a common body of law (Craies 6th Edn, pp. 133–135; Halsbury 3rd Edn, vol. 36, para. 607).

Lastly, in connection with the construction of the Valuation of Land Act, Else-Mitchell, J. in his judgment in this case said (17 L.G.R.A. at p. 275): "I should say since 1961 there may be a discretion in the Valuer-General to decide whether it is appropriate to treat particular property as land to be valued under sections 5, 6 and 7 of the Valuation of Land Act, or as stratum under sections 7A, 7B and 7C, and the erroneous valuation of a limited interest in land as pure land or of pure land as stratum would not seem to me to result in the invalidity of the valuation." It had been submitted to His Honour that whatever had been the position before 1961, the amendments made by the 1961 Act created 'an inflexible dichotomy' so that thenceforth a determination had to be made of what was true land in the sense of usque ad coelum et ad inferos which could be valued as such under the original provisions of the Valuation of Land Act on the one hand, and everything else which, because it was less than usque ad coelum et ad inferos, must be regarded as stratum and valued under the new provisions added in 1961. Else-Mitchell, J. at p. 276 continued: "The primary conclusion I have expressed, that there is no such dichotomy as was contended for, is to be derived from a proper understanding of the scope and operation of the Valuation of Land Act in the form it took before 1961 and the central provision of which (section 14) requires the Valuer-General to make valuations of all lands in the State with certain exceptions. There is no limitation on the sense in which the word "lands" is used in this section, and I should have no hesitation in saying that it can include land defined by horizontal as well as vertical boundaries." No party in this appeal contended for such a discretionary power in the Valuer-General and, with very great respect to His Honour, I can find nothing in the Act which suggests to me that since the 1961 Act the Valuer-General may choose to value land as stratum or stratum as land as it may seem appropriate to him to do so. Before 1961 the Valuer-General could not value stratum of the nature which, since 1961, has been defined in section 4 (1) (Commissioner for Railways v. Valuer-General (supra)) and I have endeavoured above to explain why, in my opinion, land

bears now the same meaning in the Act as it did prior to the 1961 Act. The Act now contains in section 4 (1) a special definition of stratum. In the result therefore the Act since 1961 specifies two subjects for valuation by the Valuer-General either of which in turn shall be used by the rating and taxing authorities as a rating and taxing basis, namely, land usque ad coelum et ad inferos and stratum in the sense of the definitions contained in section 4 (1) (sections 61, 61A and 62). The improved value of each are to be made on an identical basis but are provided for in separate sections (sections 5 and 7A). The same may be said of the assessed annual value of each (see sections 7 and 7C, noting the change of "thereon" in section 7 (1) to "therein" in section 7C (1)). But, whilst there are similarities in the determination of the unimproved value of both land and stratum, the assumptions to be made for the purpose of each valuation differ (sections 6 and 7B) as do the grounds of objection which may be taken in respect of a valuation in relation to land and of a valuation in relation to stratum (see and compare subsections (1) and (2) of section 34).

It appears to me that, if the Valuer-General had such discretion as suggested, the distinction between land and stratum would disappear not only in the act of valuation itself but in the entries upon valuation rolls and lists and the difficulties, for instance, in the proper application of clauses 2 and 2A of Schedule Three of the Local Government Act would be at once apparent. As was stated by the Privy Council in Broken Hill Pty Ltd v. Valuer-General (1970) A.C. 627 at p. 639: "There can be no doubt that up to Part VI the general framework of the Valuation (of Land) Act . . . points to the conclusion that the Valuer-General is concerned only with valuations according to one or other of the statutory formulae." As it appears to me, the amendments made by the 1961 Act, although adding to the classes of statutory formulae, provide no basis for a discretionary choice between them. With regard to His Honour's reference to section 14, I take the view that the word "lands" in that section is used in its ordinary legal signification and that the addition at the end of section 14 by the 1961 Act of the words "The provisions of this section shall apply, mutatis mutandis, to and in respect of strata" not only does nothing to detract from that meaning but provides powerful reinforcement for the argument that the Valuation of Land Act after 1961 does provide separately for two different subject matters for valuation by the Valuer-General, namely, land in its ordinary legal signification and stratum as defined in section 4 (1). But when it is said that land and stratum are different subject matters for valuation that does not mean that parts of land and parts of stratum cannot each be made the subject of valuation. The expressions "land" or "stratum" include respectively each part of land or stratum and the Act expressly contemplates that in the appropriate circumstances such parts may be valued (see sections 15 (1), 19, 26, 27, 27A, 28, 28A and 28B). Hence it seems that the Act contemplates that any part of that which regarded as a whole is land usque ad coelum et ad inferos and is not a stratum as defined in secion 4 (1) shall be valued as land

and any part of that which regarded as a whole is stratum as defined in section 4 (1) shall be valued as stratum and that there is no discretion vested in the Valuer-General to value land or parts of land as stratum or to value stratum or parts of stratum as land. Where the Act intends to vest a discretion in the Valuer-General that intention is usually made plain (see sections 15 (1), 16 (2) (d), 26, the provisoes to 48 (1) and 48 (2) and, having regard to the requirements contained in sections 14 and 48 (1) as amended by the 1961 Act, I think that the word "may" where it firstly appears in section 16 (2) does not confer a discretion.

I turn now to the Valuations Nos 710 and 4173 issued by the Valuer-General on 12th October, 1961, pursuant to section 61A of the Act. I have no doubt that these valuations were made on the basis that the whole of the subject matter thereof was solely strata. If anything were needed to make this clear, the contents of the altered valuations made by the Valuer-General in September, 1967, do so. That they were so treated by Else-Mitchell, J. is apparent from the terms of the order made by him in para. 20 of the stated case. The altered valuations made by the Valuer-General omitted from the subject matter of valuation the "land islands" (see para. 9 of the stated case) presumably on the basis that they were land usque ad coelum et ad inferos. Else-Mitchell, J. held that part of the subject matter for valuation, namely, the three areas under Carrington Street and Wynyard Park depicted respectively in plans "E", "F" and "G", were stratum as defined in section 4 (1) of the Act and that the balance of the subject matter was land but he concluded that he was entitled to value the whole of the subject matter as land and he amended Valuations Nos 710 and 4173 by deleting therefrom the reference to "stratum" or "strata" and substituted therefor as a reference to the whole subject matter of valuation a description of land (see para. 20 of the stated case). This gives rise to Question A as follows:

> "A. Was I in error in valuing as land the whole of the demised premises lying between George Street and Carrington Street?"

A preliminary matter has been raised by Mr Officer, Q.C., with regard to this question to support the argument that this question should be answered in the affirmative. This submission is that the issues before His Honour did not permit him to make a valuation of land. When in September, 1967, the Valuer-General altered Valuations Nos 710 to 4173, he omitted the "land islands" from the subject matter of the valuations and accordingly corrected the dimensions of the strata and valued the strata. In the altered valuations the Valuer-General did not value land and did not apply to the altered valuations sections 5, 6, and 7 of the Act. Mr Officer contends that, if the Valuer-General were in error in valuing the subject matter as strata and the correct basis was as land, the Court cannot invalidate the valuation by changing the basis of valuation from that of strata to one of land. The Court, he argues, is limited to the issues raised by the grounds of objection contained in section 34, of the Valuation of Land Act. Thus, he says, if the Valuer-General has valued the land as strata the power of the Court is

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limited to reducing the strata valuation from the figure arrived at by the Valuer-General to "nil" and he cited Mitchell v. Crookwell S.C. 7 L.G.R. 13; Ex parte Coff's Harbour S.C.; Re Allan 2 L.G.R.A. 293; A. G. Robertson v. Valuer-General 18 L.G.R. 261; Langford v. Western Lands Commissioner 4 L.G.R.A. 46; Parramatta C.C. v. Valuer-General 10 L.G.R.A. 160.

Of the cases referred to by Mr Officer it will be sufficient to refer to A. G. Robertson Limited v. Valuer-General (supra) in which valuations had been made of certain premises in Lismore under the Valuation of Land Act, 1916–1948. In that case the sole ground of objection taken was that the values assigned by the Valuer-General were too high. At the hearing before the Court it was argued on behalf of the Valuer-General that in fact the values were too low and that the Court had power to increase them. Sugerman J., rejected the argument stating that the issue for the Court's determination was defined by the ground of objection. He said: "The generality of the word 'erroneous' in section 39 is, in my opinion, limited by the context in which it appears. The Court's power to decide whether a valuation is erroneous arises in the course of its jurisdiction to hear and determine 'all such objections brought before it'."

Since Sugerman, J's decision in that case, by the Valuation of Land and Local Government (Further Amendment) Act, 1961, section 8 (b) of the Land and Valuation Court Act, 1921–1961, provides that the Court shall have jurisdiction "to hear and determine (b) objections to or appeals against valuations under the Valuation of Land Act, 1916". Section 16 of that Act also provides that the Court shall have power at any stage of the proceedings to order any amendments to be made which in the opinion of the Court are necessary in the interests of justice. The Land and Valuation Court Act does not, however, make any provisions as to the grounds which may be taken by way of appeal or grounds of objection against valuations. Also by the Valuation of Land and Local Government (Further Amendment) Act, 1961, the whole of Pt IV of the Valuation of Land Act was repealed and a new Part IIIA bearing the heading "Valuation Boards" was inserted in the Act and a new Pt IV bearing the heading "Appeals to Valuation Court" was substituted for the former Part IV. The Court's jurisdiction is expressed in section 39 (1) as one to "hear and determine" all appeals brought before it under section 38 and all references under section 36M. Section 38 provides for all appeals to the Court against a "determination" by a Valuation Board. Section 36M (1) provides that a Valuation Board may refer an objection to the Court for hearing as an appeal. Section 36M (2) provides that such a reference shall be deemed to be a "determination" by a Valuation Board and "the matter shall thereupon be deemed to be and shall be heard by the Valuation Court as an appeal under Pt IV of this Act". Section 39 (2) provides that any such appeal or reference (which reference is to be treated as an appeal by section 36M) shall proceed as "a new matter and be by way

of rehearing". Section 39 (6) provides that if the Court "decides that any valuation is erroneous, it shall order the valuation to be altered accordingly" Section 40 (3) provides that, if on the hearing of any appeal or reference the Court "orders any valuation to be altered, the Valuer-General shall make all such consequential alterations as are necessary for the purpose of fixing the unimproved value, the improved value and the assessed annual value in respect of the land or stratum concerned and the values of the estates and interests of the owners thereof".

The word "valuation" is not defined in either the Land and Valuation Court Act or the Valuation of Land Act but the context of the last-mentioned Act shows that that word is not to be understood as merely equivalent to a sum of money (Bonbright: Valuation of Property (1937), vol. 1, p. 10). In the context of that Act the word "valuation", in my opinion, connotes the determination of a value (see sections 5, 6, 7, 7A. 7B and 7C) and involves the ascertainment of the subject-matter to be valued, that is to say, land or stratum or land and stratum. It also involves the employment of the relevant formulae which the statute provides must be applied to the particular subject-matter. The resultant figure which is arrived at is the end result of the process of valuation; it is its quantum and thus constitutes a part of the valuation itself.

Having regard to the context of sections 39 and 40, the power of the Court under section 39 (1) to "hear and determine" an appeal or reference appears to me to confer upon the Court power to make all such orders as shall be necessary to dispose finally of the appeal or reference before it (Green v. Lord Penzance 6 A.C. 657 per Lord Selborne, L.C. at pp. 669–670 and per Lord Blackburn at p. 678).

A valuation may be "erroneous" within the meaning of section 39 (6) where its subject-matter has been wrongly described either by classifying land as stratum or stratum as land and as a consequence there has been a misapplication of one or more of the statutory formulae or an omission to take into account one or more of them which are relevant to the subject-matter when properly described. In such a case section 39 (6) requires the Court to "order the valuation to be altered accordingly", that is to say, to make the valuation correct; whereupon, where the valuation has been rectified by the Court's order, under section 40 (3) the Valuer-General is bound to make all such consequential alterations so that his valuation rolls and lists in respect of the land or stratum concerned shall accord with the corrective order of the Court.

But it appears to me that, subject to the exercise by the Court of its power of amendment under section 16 of the Land and Valuation Court Act, the jurisdiction of the Court is still limited by the objections prescribed by section 34 which are before it on the appeal or reference and is not at large and is no greater than that of the Valuation Board from which the appeal or reference was made (cf. section 39 (1) and (6) with sections 36G and 36K

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(1) and section 40 (3) with section 36L (3)). I think that, despite the amendments to the Act made in 1961, the principle enunciated by Sugerman, J. in A. G. Robertson Limited v. The Valuer-General (supra) still applies.

However, in the present instance one of the objections before the Court was that the "description" of the subject-matter of each of the valuations was not correctly stated (see section 34 (1) (a1) and (2) (b)) and, in my opinion, this would enable the Court to decide that the valuation was "erroneous" and order it to be altered accordingly, that is to say, correct the description of the subject-matter of the valuations and to dispose of the matter finally by valuing the subject-matter according to its true description. In my opinion, therefore, if Else-Mitchell, J. had correctly determined that the subject-matter of valuations Nos 710 and 4173 should have been valued as land, then he was correct in making the order referred to in clause 20 of the stated case. It follows, in my view, that the preliminary objection to the form in which Question A was answered should not be upheld. This, however, still leaves for determination the substantive arguments in relation to Question A and I now turn to deal with them.

If what I have said earlier as to the construction of the Act as amended by the 1961 Act is correct, it follows that His Honour was in error in valuing the whole of the subject-matter laying between George and Carrington Streets as land. As I have pointed out above, the Act draws a clear distinction between land on the one hand and stratum as defined in section 4 (1) on the other. Section 14 requires (but for the stated exceptions) in distinct paragraphs a valuation of all lands and all strata. The Act separately provides for the ascertainment of the three values as regards land (sections 5, 6, and 7) and for those same values as regards stratum (sections 7A, 7B, and 7C). Separate grounds of objection to be taken to the valuation of each are distinctly enumerated (section 34 (1) and (2)). As stratum is defined at the outset of section 4 (1) as a part of land, it is difficult to explain the phraseology "land or stratum" and "land and strata" repeated throughout the Act except on the basis that, although the latter is part of the former, the Legislature intended that for some important purpose each was to be treated as a separate concept. I have earlier endeavoured to make plain herein both the concept and the purpose. Although "stratum" is defined in section 4 (1) with reference to land, it is a special and artificial part of land for the purpose of rating and taxation. Although it fulfils the requirement of a part of land in the sense of consisting of a space or layer below, on or above the surface of the land and is defined or definable by reference to improvements or some other physical feature on the land, it has no separate existence for the purposes of rating independent of the land of which it is part unless under some statute it is ratable or taxable in itself as distinct from the land. Unless a stratum has such an existence, for rating and taxing purposes it is merely an entity of the land which itself may be the subject of a valuation for those purposes and it cannot be separately valued and is therefore not a separate parcel for rating purposes (see Local Government Act section 134

(3)). The scheme of the Act points irresistibly to each concept, land and stratum defined in section 4 (1), being valued on its own basis and upon the particular statutory formulae relevant to it. This question should be answered "Yes".

Question B: It follows from what I have said in relation to Question A that this question should be answered "No".

Question C: This question should be answered as to (i) "No", as to (ii) "Yes—the land islands", and as to (iii) "Yes—the balance of the subject-matter of the valuations".

Question D: f this question is to be understood as meaning that, although part of the demised premises must be valued as land and part must be valued as stratum, the valuation of the entirety is to be represented by a single amount, the answer to this question is "Yes". In amplification of such answer, if the question means that the entirety of the land and the stratum are to be valued together as a whole either both under section 6 or both under section 7B or one under section 6 and the other under section 7B, then the answer is "Yes". However, I see no objection to a notice of valuation containing particulars of a valuation of land and particulars of a valuation of stratum with an appropriate figure being shown as reflecting the amount of each such valuation.

Question E: Unless it is understood that "defined by a horizontal boundary" means by such a boundary as is an improvement and that the vertical boundaries are defined or definable by reference to improvements the questions do not arise. If, however, this be so understood, the questions should be answered as to (a) and (c) the area so defined must be valued, if at all, as stratum under section 7B. As the relevant assumption in the present case is that the area in question is one which is ratable under the Local Government Act section 132 and accordingly is required to be valued, it is implicit in the question that some part of the space between the vertical boundaries remains vested in the Crown. Therefore the requirement of valuing the land usque does not arise. As to (b) in view of the answer to (a) and (c) this question does not arise. As to (d) on the assumptions referred to in the answer to (a) and (c) this question does not arise. In so far as the general question is raised whether there is a discretion to value a "stratum" under sections 5, 6, and 7, the answer is "No".

Question F: It follows from the definition of "stratum" in section 4 (1) and the foregoing reasons that this question should be answered "Yes".

Question G: I am of the opinion that this question should be answered as to (a) "No"—the land and the stratum may by way of correction by the Court be valued separately. As to (b) "No", as to (c) "Yes". A Valuation Board of Review or the Court can value such of the subject-matter for valuation as consists of land as land and such of the subject-matter as consists of stratum as stratum but the particulars of each such valuation when

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corrected by the Valuer-General pursuant to the determination of the Valuation Board under section 36L (3) or pursuant to the order of the Court under section 40 (3), as the case may be, can be included in one notice of valuation.

Question H: I am of the opinion that this question should be answered "Yes".

Question I: The Court was not bound to excise from the valuations the land or stratum but was bound to value the land as land and the stratum as stratum. The Valuer-General has not an independent power of valuation under section 40 (3). The power of the Valuer-General under section 40 (3) is one to make alterations in his records of values consequential upon the alterations to any valuation ordered to be made by the Court.

Question J: I am of the opinion that this question should be answered "No".

Question K and L: I am of the opinion that in the circumstances of this case these questions need not be answered.

Question M: Section 11 of the Valuation of Land Act reads as follows:

> "11. Every person employed under this Act shall maintain and aid in maintaining the secrecy of all matters which come to his knowledge in the performance of his duty, and shall not communicate, divulge, or aid in divulging any such matters to any other person except for the purpose of carrying into effect the provisions of this Act.
>
> Any person offending against this section shall be liable to a penalty not exceeding one hundred dollars."

It would appear that this question was directed to a situation in which the records of an officer in the Valuer-General's Department relating to his method of arriving at a valuation of the demised premises were requested to be produced to the Court and, subject to the Court's discretion, inspected by the party calling for the document. I will assume for the moment that the records in question were relevant to the matters in issue before the Court and I shall also assume that the document embodying the records requested to be produced to the Court contained no material relating to any lands or premises other than the demised premises. I shall also assume that the records contained in the document were not prepared for the purpose of the subject litigation either on foot or in contemplation or compiled for the purpose of obtaining a legal opinion from a solicitor or Counsel advising the Valuer-General. Upon those assumptions and subject to such claim of privilege as the Crown might be able to sustain (as to which claims of privilege see Robinson v. State of South Australia (1931) A.C. 704; Ex parte Brown re Tunstall (1966) 1 N.S.W.R. 770; Ex parte Attorney-General (N.S.W.) re Cook (1967) 2 N.S.W.R. 689 at pp. 704, 705; Conway v. Rimmer (1968) A.C. 910) I see no objection to the Court permitting the Valuer-General's records produced to the Court on subpoena duces tecum or as on subpoena duces

tecum to be inspected by the parties to the litigation. I am of the opinion that in such circumstances section 11 does not operate to prevent the Court ordering the production of the records in question and the inspection of the same by parties to the litigation.

The costs of Wynyard Holdings Limited of the stated case should be paid by The Council of the City of Sydney and the Commissioner for Railways. There should be no order as to the costs of the Valuer-General.

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I certify that this and the 13 preceding pages are a true copy of the reasons for judgment herein of His Honour Mr Justice Asprey.

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JEAN DUGUID, Associate

Dated 2nd July, 1971.

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REASONS FOR JUDGMENT OF HIS HONOUR MR JUSTICE MOFFITT

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MOFFITT, J.A.: I agree with the answers given by Asprey, J.A. and with the reasons he has given. In relation to the matters raised by questions A, E and F however I wish to state my reasons although I do not understand them to be in conflict with the views of Asprey, J.A.

The substantial question at issue between the parties was as to how the unimproved value of the area between George and Carrington Streets, demised to the appellant company, should be determined. As this area was demised in terms descriptive of the entire land within defined vertical boundaries, but with defined exceptions within such vertical boundaries namely of passageways, some horizontal basement areas, Wynyard Lane and certain vertical spaces occupied by lifts and ventilator ducts, the first question which arose was whether the area to be valued should be treated as the whole land in the widest sense, namely usque ad coelum et ad inferos (hereafter referred to as "land usque"), within the outer vertical boundaries, ignoring the existence of the exceptions in the same way as exceptions of minerals might be ignored. The areas which were demised, after the exceptions were deleted, consisted in some places of a space interrupted by an excepted layer such as a passageway or basement and in other places certain spaces with no intervening exception which spaces have been referred to as "land islands". If having regard to the exceptions, those areas, which remained and which therefore were demised, answered the description of a "stratum" or a series of "strata" as defined s. 4 of the Valuation of Land Act, or some areas did so, it would be difficult to argue that the area, of which the unimproved value was to be determined under the provisions of the Valuation of Land Act, was the entire land in widest sense and not the strata which in fact was that passed to the company by the demise. It follows that the first question could not well lead to a decision that it was land usque without first examining the second question. As I understand the judgment of Else-Mitchell, J., he considered these questions as related questions and alternately as independent questions. In paragraph 30 of the stated case he stated that his conclusion concerning the area to be valued between George and Carrington Streets was that it was "land and not stratum within the meaning of the Valuation of Land Act" and that "in this connection" he held:

"(a) that property may be valued as land under the Act notwithstanding that it is defined by horizontal as well as vertical boundaries;

(b) that property may not be valued as stratum under sections 7A, 7B and 7C of the said Act unless it is an occupiable space within, upon, or under an improvement."

Having come to the conclusion it was land and not stratum to be valued His Honour then considered various alternatives should he be wrong in that conclusion. If it was not all land what was it? The question thus arose whether all of such area including the land islands could be regarded as "stratum" or whether part must be regarded as stratum and remainder, namely the "land islands", as land. If the whole or part of this area was stratum, the further question arose as to how the unimproved value of these areas between George and Carrington Streets should be determined, namely whether it should be under s. 6 or under s. 7B and whether in these processes there is any discretion in the Valuer-General and in the end the Court on appeal to resort to either as a preferred method of valuing. Finally some consideration was given as to the method of valuation if part was stratum and part was land.

The primary finding of Else-Mitchell, J., and his decision was that, looking at the instrument by which "the so called stratum is created, the demise of the land between George Street and Carrington Street . . . does not create a stratum but is a lease of the entirety of the land subject to exceptions and reservations in precisely the same fashion as a grant of land under the Crown Lands Consolidation Act is a grant of the fee simple, notwithstanding that it may be limited to the surface or specified depth of soil and despite the fact that it excepts or reserves to the Crown indigenous timber, stone for roadmaking and proclaimed materials". He came to a similar conclusion regarding that part of the area which included the exception of Wynyard Lane, treating it in principle as "no different from the grant of an estate excepting or reserving thereout a public way or private right of way" (stated case paras 30, 32; *Commissioner for Railways* v. *Wynyard Holdings Ltd* 17 L.G.R.A. at 278).

Prior to arriving at this conclusion His Honour examined at length the history of the relevant legislation, including the 1961 amendments and the objects which he considered should be ascribed thereto in relation to the Lawrence Dry Cleaners case (6 L.G.R.A. 237) and then concluded with his view as to the meaning of the definition of "stratum" in s. 4, having earlier quoted the definition and later referred in particular to the words "defined or definable by reference to improvements or otherwise". His Honour said:

> "Much debate ranged around these words and despite observations in the Hurstville Super Centre case ((1965) 11 L.G.R.A. 389) which may suggest the contrary, I am of opinion that the only sort

of stratum which may be valued as such under ss. 7A, 7B, and 7C is a a stratum which is defined by reference to improvements; that is the stratum must be an occupiable space within, upon, or under improvement. This may seem hardly satisfactory, but the definition is so wide, if read literally, that it could include many interests in the nature of pure land and one must find some means of reducing it to rational limits: the limitation I have mentioned seems to conform to the clear object of the amendments made in 1961 as well as to the assumptions which ss. 7A, 7B, and 7C require to be made when valuing a stratum." (Ibid 277–8.)

To this should be added paragraphs 28 to 30 of the stated case namely:

"28. I rejected the contention that there was an inflexible dichotomy between land and stratum. I held that the amendments made by Act No. 66 of 1961 were not intended to make new and more complex provisions with respect to the numerous situations in which interests in land less than the entirety had previously been valued alone or separately from the residue and in which valuations of such interests were combined with valuations of the entirety of adjoining land. I held that all the amendments were concerned to do was to enable unimproved values to be deduced of areas which had been held to be incapable of such valuation in the Lawrence Dry Cleaners case (1961 6 L.G.R.A. 237).

29. I held that a valuation under sections 7A, 7B, or 7C is to be made only of such stratum interests of which it would otherwise be impossible to deduce a value for the purposes of the imposition of a rate or tax, this being the essential limitation."

With respect I find I am in disagreement with His Honour's view as to the definition of stratum, with his reading down of that definition and with the justification given for that process. I do not find it necessary in this case to assign the precise significance of the words "or otherwise", which of course were dealt with in the Hurstville Super Centre case, but His Honour's approach treats the definition as though those words do not exist. There is introduced a requirement that the space must be "occupiable" which is neither an express or implied limitation of the definition. Then there is introduced a limitation concerning impossibility of deducing values under s. 6 (para. 29). This latter limitation arises, it seems, from a view that the 1961 amendments should be read down to do no more than remedy the particular problems revealed in the Lawrence Dry Cleaners case, a view to which I do not subscribe. It is not clear whether this limitation is intended to be upon the definition in s. 4 or to the scope of s. 7A, s. 7B, and s. 7C. The terms of para. 29 suggest the latter, so that such sections may not be resorted to if valuations can possibly be made otherwise. Apart from the futility which would be given to the enactment of s. 7A and s. 7C, there is nothing in the words of the definition or s. 7A, s. 7B, or s. 7C which justifies this

limitation. However, this limitation is prone to produce other error, if it is sought to say that spaces differing in some respects from that dealt with in the Lawrence Dry Cleaners case can be valued under s. 6 by some new device such as by valuing the land usque under s. 6 and making some adjustment to determine the value of the lesser space without going beyond s. 6. In one of the alternate approaches His Honour may have done this, and if so in my view was in error. It will be necessary to refer to this later.

When His Honour says that the definition, if read literally, "could include many interests in the nature of pure land" I can only infer, when the rest of his remarks are considered, that he is saying for example that if there is a space within vertical boundaries with say its lower horizontal boundary defined by an improvement and the upper boundary infinite that it would be treated as being land and excluded from the definition of stratum. The Lawrence Dry Cleaners case, of course, dealt with a specific type of space namely that within vertical boundaries and between a floor and a roof and in every sense would be an "occupiable" space. In the context of the judgment of Else-Mitchell, J., it is difficult to understand what is meant by "occupiable" space, unless factually it equates somewhat to the Lawrence Dry Cleaners case, so that a layer with an infinite upper boundary or an infinite lower boundary would not be an "occupiable" space. This construction of the definition seems to ignore the words of the definition and in particular the words "whether some of the dimensions of the space or layer are unlimited or whether all the dimensions are limited". If the "means of reducing it to rational limits" is to ignore the portion of the definition last referred to there is no justification for so doing.

To take an example, if there is demised by the Crown an entire city building above the first floor and the terms of the demise are that the upper boundary is unlimited it would seem that on the approach under considerations this would be treated as land and not stratum. But this would do violence to the words of the definition. Further, if an attempt were made to determine the unimproved value of such a space, then because it depends for one horizontal boundary upon an improvement, the same difficulty would arise as did in the Lawrence Dry Cleaners case. The whole approach in the Hurstville Super Centre case (13 L.G.R.A. 56) was based upon an acceptance that a space, the horizontal lower boundary of which is an improvement and which is unlimited upwards is a "stratum" to be valued under s. 7B, for such was the "large main stratum" (ibid. at 61, 63). To take a further example, I do not see that any difference would arise if of a twelve storey building in an excavation, vested in the Crown, the top three floors and the bottom three floors were demised, the intermediate six floors being retained by the Crown, or that the position would be any different if the term of the demise in respect of the upper three and the lower three were of unlimited boundaries upwards and unlimited boundaries downwards or if the form of the demise was of the entire land with the exception of the six intervening floors retained by the Crown. Each of the areas I have referred to in these examples are defined

by reference to improvements but so that the dimension upward or downwards, as the case may be is unlimited. In each case, as its existence and definition depends upon an improvement it is incapable of valuation under s. 6, because on the authority of Lawrence Dry Cleaners case the assumption required by s. 6 is impossible. In each case that which is demised is a stratum or several strata within the definition in s. 4, so that the basis for determining its unimproved value is that provided by s. 7B and so that the basis provided by s. 6 is neither applicable nor capable of being applied.

I return to the first question posed, namely whether the area in question is land unlimited because of the form of the demise of the whole but with exceptions. As, for the reasons just given, that which in the end vests in the appellant is strata or includes strata I can see no basis to determine it is to be strata or all land according to the form of the demise, so it is strata if exactly demised and land if all is demised subject to exceptions. The subject-matter of the valuation is only that part of the land which was demised by the Crown (The Railway Commissioner) to Wynyard Holdings Limited, for the Local Government Act, 1919, as amended, s. 132 is effective to impose a rate only on such part of the land as is demised by the Crown and it is this part which is the proper subject of valuation. This is concluded by the decision in the Lawrence Dry Cleaners case as Else-Mitchell, J. rightly accepted in the present case (supra at 280) and this view has not been challenged before us.

What then is demised by the lease? As stated, that which passes is the same and so cannot be made greater or less according to whether it is exactly described or is described by reference to something larger but subject to an exception. Again the conclusion I have indicated is inherent in the decision in the Hurstville Super Centre case where the Railway Commissioner adopted the same method of describing the area demised by reference to a "general area of land being the relevant property." subject to certain "exceptions" (ibid. 61) which net area demised comprised "the main stratum" to which earlier reference was made.

In my view therefore the whole of the land demised which lay between George and Carrington Streets was not land and ought not to have been valued under s. 6. Omitting for the moment those portions referred to as the "land islands" such spaces demised in my view constituted strata and fell to be valued under s. 7B. The area upwards from a floor level being an improvement was a stratum and the area downwards where it existed from a floor or ceiling level was a stratum and the fact that in the one demise there was a stratum upwards and a stratum downwards with a stratum in between vested in the Commissioner did not alter such areas from their character as strata within the meaning of the definition.

I would express my agreement with what Asprey, J.A., has said concerning the obligation of the Valuer-General, the Valuation Boards, and the Valuation Court to value a "stratum" as defined by the Act only as provided in s. 7A, 7B, and 7C of the Act and that there is no discretion to value it

under s. 5, 6, and 7 as land. In conformity with what I have earlier said, I would add, so far as unimproved value is concerned, that omitting any exception which might arise from the construction of the words "or otherwise" in the definition of "stratum" with which we are not here concerned, that, on the authority of the Lawrence Dry Cleaners case, it is not possible to determine under s. 6 the unimproved value of a "stratum" as defined.

In expressing my agreement that the Act provides a dichotomy between land and stratum I would add that I do not find it necessary nor would I wish to express an opinion other than that there is a dichotomy so far as valuation is concerned between areas which fall within the definition of stratum in s. 4 and other land. Whether "other land" in this dichotomy can include land of some of the descriptions referred to in Re Lehrer and the Real Property Act (6 L.G.R.A. 122) which does not answer the description of land usque I find it unnecessary to decide.

It is necessary at this point to return to the alternatives considered by His Honour to valuing all the area between George and Carrington Streets as land. His primary approach was to so value it under s. 6. He used conventional methods to value it under that section as land usque (and as he said in para. 35) "deducting therefrom such sum (if any) as, on the evidence of one or more of the valuers, represented a reduction for the exceptions and reservations in the lease". He then added "I held, alternatively, that a similar result would be reached if the demised premises were valued wholly as stratum. I also held that even if the demised premises were predominantly stratum (excluding the land islands) all the stratum may be valued together and that such a valuation could include also areas of true land (the land islands) because they were not separate parcels in any sense and as a practical matter should be valued along with the strata surrounding and adjoining them". He rejected the approach sought to be made by the appellant which in substance appears to have been to value the stratum separately and in accordance with the assumptions provided in s. 7B and the land islands separately and in accordance with the assumptions provided in s. 6. He pointed out the great practical difficulties of so doing and said "comformably with the principles expressed in paragraph 33" he "declined to determine the valuation of the demised premises upon the basis of such a demarcation as adopted by the Company's valuer" and "found as a fact it involved elements of impossibility or serious impracticability". Paragraph 33 is as follows:

> "33. In approaching the construction of the Valuation of Land Act including the amendments made in 1961 and in the application of the Act to the valuation of the demised premises I took into account the practical necessities surrounding the fulfilment by the Valuer-General of his functions and what I considered to be the unreality and impracticability of the conclusions contended for by the Company. I expressed the view that valuation

is a practical matter and should be carried out in the light of the opinions of those who are skilled appraisers and assessors, and that to import into the valuation process by way of assumption or otherwise elements of impossibility or serious impracticability would be tantamount to denying an effective operation to statutory provisions which require the making of valuations reflecting a market demand. For that reason I was prepared to treat land and stratum as capable of being valued together where practical considerations commend that course."

In their context I understand the reference to treating land and stratum as capable of being valued together not as meaning valuing the land areas first under s. 6 and then the stratum under s. 7B and adding them to give one total the subject of one notice of valuation but as adopting some procedure of valuing all in one process. Although there is some ambiguity in questions D and E, the form of the questions there asked confirm this construction of paragraphs 33 and 35. Whether the approach of valuing what was part land and part stratum in one process was done under s. 6 or s. 7B does not appear from the stated case. If they are valued in one process, as distinct from being valued separately under their respective sections and then added together, it would appear to follow that the one process must adopt either s. 6 or s. 7B for the one process could not adopt both having regard to their inconsistent assumptions, particularly those provided by s. 6 (1) and s. 7B (1) (c).

The extracts quoted from paragraph 35 also seem to indicate that if all was stratum, it was valued in one process but the stated case does not reveal whether it is to be valued under s. 6 or s. 7B. It does appear however if all was stratum the resultant value in the present case would be the same as if all was land.

If it all was land usque, then its value was considered to be such as was determined in the conventional fashion but with an adjustment, if any required in respect of the exceptions and reservations. One difficulty, however, if adjustments are made, is how this is done in the case of exceptions where the exceptions, as here, are improvements and in fact stratum. This highlights the difficulty of treating the area as land. The improvements which were passageways leading to the railway station and to streets were regarded, although excepted, as an advantage increasing the unimproved value first assessed and the other improvements being spaces excepted as basement and areas for ducts plant, etc., were regarded as a detriment and found to so affect the value as to cancel out the increased value due to the advantage arising from the other improvements. I find it difficult to see how a valuation which ultimately results from such a process, can be reconciled with the assumptions required by s. 6 and with the decision in the Lawrence Dry Cleaners case. In the result the unimproved value determined was that which would have been determined for land usque without exceptions.

If in the alternative all is to be regarded as stratum, then so far as the stated case, including the questions asked, show, it may be His Honour was referring to valuation under s. 6 or alternatively under s. 7B, because so far as the former is concerned the decision and reasons proceed at one point upon the view that there was a discretion even with a stratum to value it under s. 6. Further an alternate view seems to have been that even if the area fell within the literal meaning of stratum as defined, it was not an "occupiable" space as required by the definition as read down, and so should not be treated as stratum but as land and valued therefore of necessity under s. 6. Therefore at least so far as the stated case goes, the questions on one view are posed on the basis that, if it is stratum, it could be properly valued under s. 6 and the same result produced as if it were land. This would also give rise to the difficulties to which I have referred, quite apart from the inapplicability of s. 6 as earlier indicated.

However, some parts of the judgment (which is reported at 17 L.G.R.A. 269), which do not form part of the stated case, include reference to some of the evidence of the valuers and some of alternate analyses considered open if His Honour's primary decision was not correct. At one point the view is expressed that, if all is regarded as stratum and valued under s. 7B, still the same result would be achieved as where all was valued as land under s. 6, it seems with similar consequences in relation to adjustments for the exceptions after starting with the value of all as land under s. 6. A number of other views, perhaps tentative, were expressed if the position were that the area in question was part land and part stratum and alternatively if that part which was stratum was valued and the land was excised from the valuation. No questions have been posed in the stated case in relation to this evidence, which is not set out in the stated case or the judgment or as to the validity of these various approaches in relation to such evidence. In the result, the questions, which have been posed in the stated case, must be answered in relation to the alternatives open upon the case as stated so far as such questions arise. Such observations as did not form part of the primary decision in the case and are not part of the stated case, so far as they are still relevant on any further consideration of this matter, may need to be reconsidered in the light of the decision given by this Court upon the questions raised in the case.

I return now to the questions raised by the stated case. If as suggested there is a discretion to value a stratum under s. 6 or if there is as suggested an obligation to do so because it is not an occupiable space or because it should not be treated as a stratum because it is possible to derive a value under s. 6 by some means, then one view of the stated case is that, upon such an approach, the same result would be reached, as if the area to be valued was treated as land usque, no adjustment being found necessary in respect of the exceptions considered as a whole. For reasons earlier given, a stratum cannot be valued under s. 6 because of the assumptions required to be made by that section. The reasons referred to in the stated case suggest it is

permissible to do so under s. 6 if it is possible by some means to do so and that s. 7B is reserved for cases, where it is impossible to do so under s. 6. If the suggested process of valuation of a stratum is to start off with the entire land and value it under s. 6 and then make an adjustment for the exceptions, which are the difference between the land and the stratum and if by this means it is suggested that a valuation of the stratum can be determined under s. 6 and not s. 7B, such process involves a fundamental fallacy which should be referred to. The fallacy relates to the supposed adjustment or lack of it. On what basis is the adjustment evaluated? If it is done by valuing that which is excepted, this means valuing the strata excepted and retained by the Commissioner and then deducting the same from the value of the entirety to arrive at the value of the area demised namely the stratum. If the adjustment is made this way, then to arrive at the value of the stratum of the Commissioner, which is an improvement, it, on the authority of the Lawrence Dry Cleaners case would have to be valued under s. 7B. On no view could the value of the remainder be determined by this procedure, because of the assumptions made by those respective sections are different. The hypothesis that the sum of the parts equal the whole is inapplicable where values are derived on different and conflicting statutory assumptions. If, on the other hand, the exception is not valued in this manner, but the question of adjustment is met by asking how much less in value is the stratum than the entirety valued under s. 6, by reason of the exceptions constituting the difference, then how is the comparison made unless it is asked what is meant by the "value of stratum" for the purpose of such comparison. This can only be the value under s. 7B. Thus a stratum can only be valued under s. 7B. The operation of that section cannot be avoided by an adjustment of a valuation of a larger area valued under s. 6.

Even if the value of a stratum is determined making the assumptions required by s. 7B, the process of starting with the value of the entire land under s. 6 and adjusting it in order to bring to account the differences between the entirety and the stratum, involves some difficulties and certainly a danger of error. The process involves not embarking upon the question posed by s. 7B but embarking upon the question raised by s. 6. Each involves a different question upon different assumptions, so it is difficult, but perhaps not impossible, to make a comparison proper to found some adjustment to convert value of land under s. 6 to value of stratum to be valued under s. 7B.

A further observation should be made on the question of valuation if part is land and part is stratum. The procedure proposed of valuing the land and stratum as an entirety in one procedure and the conclusion reached presumably depended on the view expressed that the area to be valued was predominantly stratum and upon the practical difficulties of separately valuing the stratum under s. 7B and the land under s. 6. For reasons already indicated each must be valued separately under s. 7B and s. 6 applying the assumptions appropriate to each valuation.

The very great practical difficulties stressed by His Honour, no doubt, are significant matters and one can only have sympathy for those charged with the artificial and near impossible task of applying the existing provisions of the legislation to a case such as the present. However, allowing in full for the latitude permissible in construing doubtful statutory provisions so as to give to them practical effect, with respect I think, that, to place upon the provisions of the Act in question the constructions given to them, is to disregard those provisions in favour of different provisions considered more workable. The difficulty arose because in the case of land owned by the Crown only that part demised is ratable, so that the unimproved value of that part had to be determined. The Lawrence Dry Cleaners case revealed that, where that which was demised, depended upon an improvement, it was not possible to determine the unimproved value, i.e. under s. 6. The Act was amended in 1961. Instead of providing for valuation of the land usque under s. 6 with apportionment between those parts ratable and those exempt cn some fair basis, as was suggested by Hardie J. in that case in conformity with the Victorian legislation (supra at 249), the amendment still required the ratable part to have its particular unimproved value determined, but of necessity on new assumptions. The new assumptions were to make possible that which was said to be impossible, namely to determine the unimproved value of that which was improvement. Apart from the difficulties anyhow in so valuing strata, extreme difficulty arises from the terms of s. 6 and s. 7B and the dichotomy between land and stratum where in the one demise and perhaps in the one structure there are some areas of stratum and some of land. To quote the words Else-Mitchell J. their valuation separately "involved elements of impossibility or serious impractability". It is regrettable that because of the terms of the legislation this case has to be returned to him to undertake this task. I would agree with the observations of Hardie J. referred to, and suggest they need reconsideration.

I agree with the answers and order proposed by Asprey J.A.

I certify that this and the 9 preceding pages are a true copy of reasons for judgment herein of His Honour, Mr Justice Moffit.

LYNDALL KREBBS, Associate.

Dated 2nd July, 1971.

No. 5

REASONS FOR JUDGMENT OF HIS HONOUR MR JUSTICE HOLMES

In the Supreme Court of New South Wales Court of Appeal

No. 5

Reason for Judgment Holmes, J.

HOLMES J.A.: Though I had prepared in draft part of a judgment in this matter, I am entirely in agreement with the reasons of *Asprey,* J.A. both in respect of the construction of the Valuation of Land Act and in the answers he proposes to the Stated Case, that anything I might say would be surplusage and repetitious.

I agree with the answers proposed and with the orders for costs.

I certify that this page is a true copy of the reasons for judgment herein of His Honour Mr Justice Holmes. 10

M. CLANCY, Associate.

Dated 2nd July, 1971.

No. 6

JUDGMENT OF THE COURT OF APPEAL

In the Supreme Court of New South Wales Court of Appeal

No. 6

Judgment of Court of Appeal

ASPREY, J.A.: In this matter the Court was constituted by my brother Moffitt, my brother Holmes, and myself.

I am of opinion that Question A should be answered Yes, that Question B should be answered No, that Question C should be answered as to par. (i) No, as to par. (ii) Yes—the land islands, and as to par. (iii) Yes—the balance of the subject matter of the valuations.

Question D: I am of opinion that if this question is to be understood as meaning that, although part of the demised premises must be valued as land and part must be valued as stratum, the valuation of the entirety is to be represented by a single amount, the answer to this question is Yes. In amplification of such answer, if the question means that the entirety of the land and the stratum are to be valued together as a whole either both under s. 6 or both under s. 7B or one under s. 6 and the other under s. 7B, then the answer is Yes. There is no objection to a notice of valuation containing particulars of a valuation of land and particulars of a valuation of stratum with an appropriate figure being shown as reflecting the amount of each such valuation.

Question E: I am of opinion that unless it is understood that "defined by a horizontal boundary" means by such a boundary as is an improvement and that the vertical boundaries are defined or definable by reference to improvements the questions do not arise. If, however, this be so understood, the questions should be answered as to (a) and (c) the area so defined must be valued, if at all, as stratum under s. 7B. As the relevant assumption in the present case is that the area in question is one which is ratable under the Local Government Act s. 132 and accordingly is required to be valued, it is implicit in the question that some part of the space between the vertical boundaries remains vested in the Crown. Therefore the requirement of valuing the land usque does not arise. As to (b) in view of the answer to (a) and (c) this question does not arise. As to (d) on the assumptions referred to in the answer to (a) and (c) this question does not arise. In so far as the general question is raised whether there is a discretion to value a stratum under ss. 5, 6, and 7, I am of opinion that the question should be answered No.

Question F: I am of opinion that this question should be answered Yes.

Question G: I am of the opinion that this question should be answered as to (a) No—the land and the stratum may by way of correction by the Court be valued separately. As to (b) No, as to (c) Yes. I am of the opinion

that a Valuation Board of Review or the Court can value such of the subject matter for valuation as consists of land as land and such of the subject matter as consists of stratum as stratum but the particulars of each such valuation when corrected by the Valuer- General pursuant to the determination of the Valuation Board under s. 36L (3) or pursuant to the order of the Court under s. 40 (3) as the case may be, can be included in one notice of valuation.

Question H: I am of the opinion that this question should be answered Yes.

Question I: I am of the opinion that the Court was not bound to excise from the valuations the land or stratum but was bound to value the land as land and the stratum as stratum. The Valuer-General has not an independent power of valuation under s. 40 (3). The power of the Valuer-General under s. 40 (3) is one to make alterations in his records of values consequential upon the alterations to any valuation order to be made by the Court.

Question J: I am of the opinion that this question should be answered No.

Questions K and L: I am of the opinion that in the circumstances of this case these questions need not be answered.

Question M: It would appear that this question was directed to a situation in which the records of an officer in the Valuer-General's Department relating to his method of arriving at a valuation of the demised premises were requested to be produced to the Court and, subject to the Court's discretion, inspected by the party calling for the document. I will assume for the moment that the records in question were relevant to the matters in issue before the Court and I shall also assume that the documents embodying the records requested to be produced to the Court contained no material relating to any lands or premises other than the demised premises. I shall also assume that the records contained in the document were not prepared for the purpose of the subject litigation either on foot or in contemplation or compiled for the purpose of obtaining a legal opinion from a solicitor or counsel advising the Valuer-General. Upon those assumptions and subject to such a claim of privilege as the Crown might be able to sustain, I see no objection to the Court permitting the Valuer-General's records produced to the Court on subpoena duces tecum or as on subpoena duces tecum to be inspected by the parties to the litigation. I am of the opinion that in such circumstances s. 11 does not operate to prevent the Court ordering the production of the records in question and the inspection of the same by the parties to the litigation.

I am of the opinion that the costs of Wynyard Holdings Limited of the stated case should be paid by the Council of the City of Sydney and the Commissioner for Railways. There should be no order as to the costs of the Valuer-General. I publish my reasons.

My brother Holmes is in agreement with the answers which I have proposed and with the orders for costs which I have proposed, and I am authorized by his Honour to published his reasons.

MOFFITT, J.A.: I agree with the answers and the orders proposed by my brother Asprey, and I publish my reasons.

ASPREY, J.A.: The order of the Court will be that the questions be answered in the manner in which I have stated them to be and the order for costs will be as I have stated it to be.

No. 7

JUDGMENT OF COURT OF APPEAL ON MOTION FOR DIRECTIONS

In the Supreme Court of New South Wales Court of Appeal

No. 7

Judgment of Court of Appeal

ASPREY, J.A.: This is a motion taken out by the Commissioner for Railways as the appellant to the Judicial Committee of the Privy Council. The notice of motion is dated 10th November, 1971. The notice asks for two orders. That which appears in para. 2 asking for an extension of time within which the index should be settled was dealt with by the Court last Monday, and we need not be further concerned with that.

What we are concerned about today is the first order asked for, namely that there should be included in the record for the hearing of the appeal to Her Majesty-in-Council certain documents as set out in the draft index, a copy of which is annexed to the affidavit sworn on 10th November, 1971, by Mr A. R. Coleman in support of the motion. These documents, we think, fall into three categories. The first category consists of the reasons for judgment of Else-Mitchell, J. There has been no opposition to the inclusion of this document, and in the course of the hearing of the appeal upon the stated case from Else-Mitchell, J. we did consider the reasons given by his Honour. It may well be that the Law Reports containing that judgment of his Honour will not be readily available to their Lordships. Accordingly we think that those reasons should be included.

The other item in this category is the model showing the development of the site. I might say that the present Court was specially constituted to hear this aspect of the motion, as the members of the Court today were the same members as constituted the Court upon the hearing of the appeal from Else-Mitchell, J. Upon the appeal the model was shown to us and retained by us whilst we were considering our judgments. We found it of assistance, and we think that it would be of similar assistance to their Lordships when the appeal is being opened to them. Accordingly, we think that the model should be deemed to be a part of the record in the appeal to the Judicial Committee.

The next category of documents comprises two matters. The first one is that referred to in para. 17 of Mr Coleman's affidavit, namely building plans and a plan of alleged stratum which were Exhibit "E" before Else-Mitchell, J. The building plans at each floor level are drawn on the same scale as the stratum plan annexed to the stated case, and it is contended that these plans would enable the relationship between the lines of alleged demarcation between land and stratum on the one hand and the physical improvements actually in existence on the other to be readily seen by placing

a transparent reproduction of the stratum plan over the building plan at each floor level. The other items in this category are the photographs of the subject site and of the improvements thereon which comprised Exhibit "O", in the hearing of the case before Else-Mitchell, J.

We do not think that these plans and photographs should form part of the record. They were not part of the stated case and were not looked at by us. But it well might be that their Lordships, not being as fully familiar with the buildings and site in Sydney as we ourselves are, might wish for further enlightenment upon some of the aspects thereof. We have therefore informed Mr Jeffrey, senior counsel for the appellant Commissioner for Railways, that we see no objection to those plans and those photographs being taken by his instructing solicitors to London and being available during the hearing of the appeal before the Judicial Committee, so that, if their Lordships were to find some difficulty by reason of their not possessing the same familiarity with the site as we ourselves have in understanding some aspects of the case, they may seek further enlightenment from either these plans or photographs or both; but whether they be looked at would of course be a matter entirely for the discretion of their Lordships. But these plans and photographs, so far as this Court is concerned, will not be included as part of the record.

The third category of documents comprises three matters, and these are those referred to in paras 20, 21 and 22 of the affidavit of Mr Coleman. In our opinion these documents are not properly part of the record and should not be included therein. These were not made part of the stated case, nor were they looked at by us in any way on the appeal from Else-Mitchell, J. and therefore we think that they should be excluded from the record.

In order that their Lordships may have an understanding as to why certain of the matters, such as the reasons of Else-Mitchell, J. and the model, have been included or deemed to be included as part of the record and why we have thought that their Lordships might have available to them the building plans and photographs, to which I have earlier referred, we also think that these reasons should be included as part of the record on the appeal.

There only remains the question of costs. What do you say, Mr Jeffrey?

Mr JEFFREY: We would submit that the costs of today's application be costs in the appeal. It is an application which we necessarily brought, with respect, since, as matters stood prior to this Court's adjudication this morning——

ASPREY, J.A.: Without in any way making up our minds, during the short adjournment whilst we were considering this matter we did briefly advert ourselves to the question of costs and we did consider whether or not they should be costs in the trial, but there may be great difficulties with regard to that; we thought. I should tell you what we had in mind. It may be that one party or another will succeed as to part and will fail as to part in the appeal. I understand that not only your client, the Commissioner for Railways, but also Wynyard Holdings and also the City Council are appellants?

In the Supreme Court of New South Wales Court of Appeal

No. 7

Judgment of Court of Appeal

ALL COUNSEL: That is so.

ASPREY, J.A.: It may be that one will succeed as to part and fail as to part. We think that difficulties would arise then having regard to the costs of this motion. While on the question I may as well point out to you that we also bore in mind that you have succeeded as to two items, but you had no opposition. With regard to the other five items in substance you failed, but we have exercised a discretion in your favour in according you permission to make the building plans and the photographs available, in case their Lordships should think they need them, we not wanting to pre-empt their Lordships' discretion in case they had a difficulty in this matter. But substantially you have failed in the motion.

Mr JEFFREY: I do not understand that before the learned Registrar there was consent by my friends or whoever was appearing in the same interests there, to the inclusion of any reasons.

Mr GLEESON: There was consent to the model, and the question of the reasons for judgment was not debated.

ASPREY, J.A.: I may be wrong. I do not know whether you were present last Monday. I was the only member of the present Bench last Monday, Mr Jeffrey, and I have a strong recollection—whether I said it out loudly or not, so that members of the Bar could hear, I do not know—but I certainly then expressed my opinion to my brethren on the Bench, the Acting Chief and Mason, J.A., that the model should certainly be made available to their Lordships. There was never any doubt about that.

Mr JEFFREY: Thank you, your Honour, for that. The fact appears to remain that the determination of the learned Registrar was as appears from his judgment annexed to the affidavit that the record should contain only the case stated and annexures thereto, which would involve the exclusion from the record of both reasons for judgment and the model. My learned friend Mr Gleeson interposes unless of course their inclusion was consented to by the other side. I acknowledge that if the only matters troubling us had been the reasons for judgment and the model, this application today may have been unnecessary, unless my friend is intimating that had we approached him consent may have been forthcoming, I have nothing to say about that. I just do not know. But we would simply say that the Commissioner, as things stood after the determination of the learned Registrar, was in the position of a party reasonably requiring some further relief which to an extent he has today obtained and therefore ought not to be in the position of a party who, without reasonable cause, has brought an application which has been unsuccessful. Putting it at its lowest, that would mean that the Commissioner should not today be penalized in costs, in our submission, should not be ordered to pay anyone's costs; even if your Honours thought that he should not have a contingent entitlement to costs it would be the result of making today's costs costs in the appeal.

I am reminded that the order which this Court made a few days ago in this motion was that costs thereof be costs in the application for conditional

leave. That brings today's costs into the body of costs which relate to proceedings in this Court subsequent to the Court of Appeal's judgment, and they are costs which will be determined by the ultimate outcome of the appeal.

ASPREY, J.A.: It seems whichever way you discuss it it is full of complications.

Mr JEFFREY: Yes. The complications can perhaps be reduced in number if this Court were disposed to order that the costs of today's motion be costs in the appeal of the Commissioner to the Privy Council; so that if the Commissioner were ultimately the successful appellant the Commissioner has today's costs; if the Commissioner were not ultimately a successful appellant the Commissioner bears today's costs of the respondents.

ASPREY, J.A.: What was the order made for costs last day?

Mr JEFFREY: That the costs be costs in the application for conditional leave. Now my recollection is that.

ASPREY, J.A.: It was unopposed last week?

Mr JEFFREY: Yes. I am not suggesting that there was anything binding about this but the costs in the application for conditional leave are themselves made costs in the appeal. So . . .

ASPREY, J. A.: There was no debate on the costs last occasion at all?

Mr JEFFREY: No.

ASPREY, J.A.: What do you say Mr Gleeson?

Mr GLEESON: I would ask for an order for costs against the Commissioner. As I mentioned earlier this was the last round in a long standing battle fought out before Else-Mitchell, *J.* as to whether Mr Woodley's transcript of evidence should be included in the stated case. That is the real bone of contention before the Prothonotary, Mr Noonan, and it took up most of the time for costs.

Mr BROPHY: I ask for costs.

Mr HEMMINGS: I ask for costs.

ASPREY, J.A.: It is not an easy matter to sort this out, but I think the difficulty would be best resolved in all the circumstances if the order for costs—and this is the order for costs—be that two-thirds of each of the respondents' costs of today's hearing of the motion are to be paid by the appellant Commissioner for Railways.

I certify that this and the four preceding pages are a true copy of the reasons for judgment herein of His Honour Mr Justice Asprey.

JEAN DUGUID, Associate.

Dated 25th November, 1971.

No. 8

[Rule of the Court of Appeal granting final leave to appeal to Her Majesty in Council.]

The Sixth day of December, 1971.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the twenty-ninth day of November, 1971, WHEREUPON AND UPON READING the said Notice of Motion, the Affidavit of Alan Rees Coleman sworn on the twenty-ninth day of November, 1971, and the Prothonotary's Certificate of Compliance, AND UPON HEARING what is alleged by Mr G. Horton of Counsel for the Appellant The Commissioner for Railways, Mr J. S. Wenden, the Solicitor for the Appellant Wynyard Holdings Limited, Mr F. Brophy of Counsel for the Appellant The Council of the City of Sydney, and Mr T. E. Feld, Solicitor for the Respondent The Valuer-General, IT IS ORDERED that final leave to appeal to Her Majesty in Council from the Judgment of this Court given and made herein on the second day of July, 1971, be and the same is hereby granted to the Appellants AND IT IS FURTHER ORDERED that upon payment by the Appellants of the costs of preparation of the Transcript Record and despatch thereof to England the sum of FIFTY DOLLARS ($50.00) deposited in Court by each of the respective Appellants as security for and towards the costs thereof be paid out of Court to the said respective Appellants.

BY THE COURT,
For the Registrar.
(L.S.)

K. C. FLACK, Chief Clerk.

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MEMORANDUM OF LEASE BETWEEN THE COMMISSIONER FOR RAILWAYS AND WYNYARD HOLDINGS LIMITED

[Dated 19th December, 1961]

THE COMMISSIONER FOR RAILWAYS a body corporate created under or by virtue of the Transport (Division of Functions) Act 1932 as amended (hereinafter called or included in the expression Lessor) being registered as the proprietor of an estate in fee simple in the land hereinafter described, subject, however, to such encumbrances, liens, and interests as are notified by memorandum underwritten or endorsed herein and being the owner of a Publican's Licence in respect of the Plaza Hotel George Street Sydney part of the premises hereby demised and held by or on behalf of the Lessee at the time of the execution hereof Doth hereby subject to the Approval of the Governor lease unto WYNYARD HOLDINGS LIMITED (formerly WYNYARD PLAZA PTY. LIMITED) a Company duly incorporated in the State of New South Wales with its registered office at 291 George Street Sydney in the said State (herein called or included in the expression Lessee) ALL THAT piece of land mentioned in the schedule following

County	Parish	Reference to Title			Description of land
		Whole or part	Vol.	Fol.	(If part only)
Cumberland	St. Philip	Whole	3108	191	

AND ALL THOSE pieces of land under Common Law Title in the County and Parish aforesaid delineated in the plans hereto annexed and marked "A", "E", "F" and "G" and therein coloured red AND ALL THAT part of Wynyard Lane bounded on the north by the westerly prolongation of the northern boundary of the land one rood nine and one-half perches (1r. 9½p.) in area shown on the said plan "A" and bounded on the south by a line joining the southwestern corner of the said land one rood nine and one-half perches (1r. 9½p.) in area with the southeastern corner of the land one rood one and one-quarter perches (1r. 1¼p.) in area shown on the said plan "A" excepting thereout the stratum of land twenty feet (20′) wide and twenty

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feet (20′) high as illustrated in the longitudinal section on the said plan "A" (subject in relation to the land shown in the said plans "E", "F" and "G" and the above described part of Wynyard Lane shown on the said plan "A" to the provisions of Clause Fifty-five hereof) ALL which said pieces of land under the Real Property Act, 1900, as amended, and under Common Law title are hereinafter referred to as the demised premises which expression where the context so admits but subject to any exception out of this Lease and reservation to the lessor hereinafter made shall include any building structure fixture or improvement and all things thereto belonging which are at the commencement of or may during the term be erected placed or made by the Lessor or the Lessee on the demised premises and shall include any part thereof EXCEPTING nevertheless out of this lease:

1. (a) All that land or strata of land wholly comprised within the land held under Common Law Title shown coloured blue on plan "B" and the Elevations thereof shown uncoloured on plan "C" both hereto annexed which said land or strata of land is herein called the Lessor's passageways (which expression where the context so admits shall include the Northern and two (2) Southern Passageways indicated on the said plans and any of them and any part of any of the same);

(b) All that land or strata of land partly comprised within the land held under Common Law Title and the land described in Certificate of Title Volume 3108 Folio 191 shown coloured blue in the plan hereto annexed and marked with the letter "J";

(c) All that land or strata of land wholly comprised within the land described in Certificate of Title Volume 3108 Folio 191 shown uncoloured in the Sectional Elevations thereof in plan "D1" and coloured blue in plans "D2" and "D3" all hereto annexed.

2. AND GRANTING unto the Lessee as appurtenant to the demised premises but subject always to the provisions of this Lease and reservations unto the Lessor hereinafter contained right and liberty for the Lessee or his sub-lessee or any invitee of him or them or either of them or any person authorised by him or them or either of them to have pedestrian use of and to the Lessor's passageways and to have pedestrian ingress egress and regress to and from any lift shop or office of the Lessee during such time as and to the extent to which from time to time the Lessor's passageways are open for use by the public PROVIDED THAT—

(a) The Lessee will not exercise such right and liberty nor will he permit his sub-lessee or any invitee of him or them or either of them or any other person authorised by him or them or either of them to exercise such right and liberty in such manner as in the opinion of the Lessor will cause inconvenience to undue interference with or other disadvantage to the Lessor's railways and the public or either of the same;

(b) The Lessee will not use nor will he permit his sub-lessee or invitee of him or them or either of them or any other person authorised by him or

them or either of them to use the Lessor's passageways for the carrying or other transportation inwards or outwards of any goods or merchandise or of any article or thing of any kind not being a purely personal possession readily capable of being carried by hand at any hour or time other than from midnight to eight of the clock in the forenoon on any Monday Tuesday Wednesday Thursday Friday or Saturday from half past nine of the clock in the forenoon to four of the clock in the afternoon and from eight of the clock in the afternoon to midnight on any Monday Tuesday Wednesday Thursday or Friday and from half past nine to eleven of the clock in the forenoon from two to four of the clock in the afternoon and from eight of the clock in the afternoon to midnight on any Saturday;

(c) The Lessor may on any day or for part of a day or in the case of an emergency for more than a day or for any other period of time by notice in writing to the Lessee prohibit the carrying or other transportation inwards or outwards of any goods or merchandise or of any article or thing of any kind not being a purely personal possession readily capable of being carried by hand or may vary limit or otherwise affect any aforesaid time or hour;

(d) The Lessor's passageways will always and in all respects whatsoever be and remain under the absolute control of the Lessor who nevertheless will not arbitrarily prohibit limit or restrict the use of the Lessor's passageways and who without derogating from the aforesaid exception 1 (a) will as far as in its opinion its or public convenience or requirements may permit enable the Lessee his sub-lessee or any invitee of him or them or either of them or any other person authorised by him or them or either of them to have as reasonable benefit and advantage as may be had from the right and liberty to use the Lessor's passageways.

3. AND without in any way limiting any exception out of this Lease or in anywise preventing the fullest effect being given thereto RESERVING unto the Lessor—

(I) from this Lease of land described in Certificate of Title Volume 3108 Folio 191—

(a) FULL and free right and liberty at any time or from time to time to construct place make have use keep or maintain on in under over through or along the land or strata of land shown uncoloured and coloured as aforesaid in the said plans "D1", "D2" and "D3" a goods lift of such type design or size as the Lessor may think fit and any necessary structure machinery appliance or accessory therefor or in connection therewith;

(b) FULL and free right and liberty at any time or from time to time to construct place make have use keep or maintain on in under over through or along the land or strata of land shown uncoloured and coloured as aforesaid in the said plans "D1", "D2" and "D3" a ventilating shaft or any other ventilating system and any necessary structure machinery appliance or accessory therefor or in connec-

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tion therewith or to have use or keep the said land or strata of land as space or area for ventilation or for a ventilating shaft;

(c) FULL and free right and liberty to extend or carry any goods lift or any structure machinery appliance or accessory therefor or in connection therewith to the depth or to the height and in the position shown in the said plans "D1", "D2" and "D3" AND to extend or carry any ventilating shaft or other ventilating system and any necessary structure machinery appliance or accessory therefor or in connection therewith wholly or partly through or beyond the height or structure of any building which the Lessee may construct on the demised premises in the position and to the extent shown in the said plans "D1", "D2" and "D3" or as may from time to time be mutually agreed between the Lessor and the Lessee;

(II) from this Lease of land under Common Law Title—

(a) FULL and free right and liberty to the continuance and maintainance of the roof and floor of the Lessor's passageways;

(b) FULL and free right and liberty to the continuous and uninterrupted support of the Lessor's passageways;

(c) FULL and free right and liberty for the Lessor or any invitee Licensee officer servant workman or other person whomsoever expressly or impliedly authorised by it for any purpose whatsoever with or without any means of conveyance or transportation or any kind of tool implement material appliance merchandise article or thing at any time or from time to time to enter upon remain go return pass or repass on in over through or along ALL that the land or strata of land coloured green in the plan hereto annexed and marked with the letter "H";

(d) FULL and free right and liberty to use any column not included in the demised premises in such manner as is requisite for public convenience or railway purposes;

(e) FULL and free right and liberty for the Lessor or any invitee licensee officer servant workman or other person whomsoever expressly or impliedly authorised by it for any purpose whatsoever with or without any means of conveyance or transportation or any kind of tool implement material appliance merchandise article or thing at any time or from time to time to enter upon remain go return pass or repass on in over through or along that part of the demised premises shown coloured red in the plan marked "G" hereto annexed for the purpose of placing erecting constructing affixing attaching laying using or having therein or thereon or removing therefrom any ventilating shaft or system air gas vapour water sewer or electrical or other cable main conduit wire pipe equipment fitting or appliance;

(III) from the grant to the Lessee of pedestrian rights and liberties as in clause Two (2) hereof provided:

(a) FULL and free right and liberty for the Lessor or any invitee licensee officer servant workman or other person whomsoever expressly or impliedly authorised by it for any purpose whatsoever with or without any means of conveyance or transportation or any kind of tool implement material appliance merchandise article or thing at any time or from time to time to enter upon remain go return pass or repass on in over through or along the Lessor's passageways (which for the purpose of Clause 3 (III) (a), (b), (c) and (d) shall include the roof and floor thereof);

(b) FULL and free right and liberty at any time or from time to time at its absolute discretion to use and allow the use by any other person of the Lessor's passageways for any purpose or in any manner whatsoever or howsoever;

(c) FULL and free right and liberty at any time or from time to time to use the Lessor's passageways for or for the purpose of placing constructing affixing attaching using or having therein or thereon or removing therefrom any or any kind of light sign poster hoarding advertisement display contrivance or other thing of a like or a different kind whether mechanical electrical or of any other kind or nature or any Railway notice board sign or notice or for the purpose of placing constructing affixing attaching laying using or having therein or thereon or removing therefrom any air gas vapour water electrical or other cable main conduit wire pipe equipment fitting or appliance now or hereafter known invented discovered used or to be used for or in connection with the City and Suburban Electric Railway and;

(d) FULL and free right and liberty at any time or from time to time to close off barricade or otherwise prevent the use wholly or partly by any person of the Lessor's passageways for such period of time as the Lessor may deem necessary or desirable;

PROVIDED HOWEVER that the Lessor in the exercise of any right and liberty or power reserved to it under clauses 3 (II) and 3 (III) hereof will not act arbitrarily and without derogating from any exception of reservation herein expressed or implied will as far as in its opinion its or public convenience or requirements may permit enable the Lessee to have and enjoy as reasonable benefit and advantage as may be had from the demised premises and enable the Lessee or his sub-lessee or any invitee of him or them or either of them or any other person authorized by him or them or either of them to have as reasonable benefit and advantage as may be had from the right and liberty to use the Lessor's passageways.

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(IV) from this Lease of the whole of the demised premises:—

(a) FULL and free right and liberty for the Lessor or any invitee licensee officer servant workman or other person whomsoever expressly or impliedly authorised by it for any purpose whatsoever with or without any means of conveyance or transportation or any kind of tool implement material appliance merchandise article or thing at any time or from time to time to enter upon remain go return pass or repass on in over through or along ALL that the land or strata of land coloured green in the plan hereto annexed and marked with the letter "J";

(b) FULL and free right and liberty for the Lessor or any invitee licensee officer servant workman or other person whomsoever expressly or impliedly authorised by it for any purpose whatsoever with or without any means of conveyance or transportation or any kind of tool implement material appliance merchandise article or thing at any time or from time to time to enter upon remain go return pass or repass on in over through or along the demised premises for the purpose of the use AND to use the Lessee's three (3) service lifts indicated on plan "J" hereto annexed as a way of access to and from the land excepted from this Lease and to exercise the rights reserved to the Lessor out of this Lease and for such uses as the Lessor may deem necessary for any railway purposes PROVIDED that such entry access and use of the said lifts shall be under the supervision of the Lessee or his authorised representative.

(c) FULL and free right and liberty at any time or from time to time to enter upon the demised premises and do anything whatsoever for any railway purposes;

(d) FULL and free right and liberty at any time or from time to time to enter upon the demised premises and to erect place make lay in have use keep maintain or remove and to permit the erection placing making laying in having using keeping maintaining or removal of any appliance for or belonging to the Lessor required by the Lessor for the transmission by any means now or hereafter known or used of power light water or other element or thing with or without any cable main conduit wire pipe equipment fitting drain channel sewer or tunnel of any kind nature or description on in under over through or along the demised premises;

(e) FULL and free right and liberty at any time or from time to time to enter upon the demised premises and to construct place make thereon any mast structure or attachment which may if desired be luminous or illuminated and any cable main conduit wire equipment fitting or any other appliance or thing in the opinion of the Lessor necessary for the safe working of any railway facility but

as far as practicable without detracting from the design or appearance of the street elevation of the demised premises.

(f) FULL and free right and liberty for the Lessor or any officer servant or workman of it or for any civic local public or statutory authority or for any officer servant or workman of any such authority or for any person authorised by the Lessor or any such authority at any time or from time to time to enter upon remain go return pass and repass on in under over through or along the demised premises or the Lessor's passageways (including the roof and floor thereof) with or without any means of conveyance or transportation or any kind of tool implement material appliance merchandise article or thing for inspecting examining surveying supervising repairing renewing altering amending cleansing maintaining or doing any other thing whatever which the Lessor or any such authority may deem necessary in respect of—

(1) the Lessor's passageways

(2) all that and every part of the demised premises or any constructional work erected or constructed or to be erected constructed on in under over through or along the demised premises which in any way supports or contributes towards or is used for or for the purpose of supporting maintaining or upholding the floor or roof of the Lessor's passageways

(3) any goods lift

(4) any ventilating shaft or ventilating system

(5) any cable main conduit wire pipe equipment fitting appliance drain channel sewer or tunnel or

(6) any light sign poster hoarding advertisement advertising display contrivance railway notice board notice indicator or any other equipment or thing of the like or a different kind of or or belonging to the Lessor

PROVIDED HOWEVER that the Lessor in the exercise of any right and liberty or power reserved to it under the last mentioned sub-paragraphs lettered (a), (b), (c), (d), (e) and (f) will not arbitrarily and as far as in its opinion its or public convenience or requirements and the due proper and economical execution or performance of any act work matter or thing may permit will refrain from causing unreasonable inconvenience to or interference with the Lessee his sub-lessee or any invitee of him or them or either of them or any other person authorised by him or them or either of them and will as part of or after the completion of any act work matter or thing executed or performed by it or on its behalf repair and make good subject to any such act work matter or thing any damage done in its execution or performance to the demised premises including any fixture fitting or thing of the Lessee or his sub-lessee therein or thereon TO BE HELD by the Lessee for the term of ninety-eight (98) years computed from the first day of December One

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thousand nine hundred and sixty-one YIELDING AND PAYING therefor the yearly rent of—

(i) THIRTY ONE THOUSAND EIGHT HUNDRED AND NINETY ONE POUNDS (£31,891) during the first three (3) years of the term PROVIDED that if during the said first three (3) years of the term any area of the buildings structures fixtures and improvements to be erected placed or made by the Lessee upon the demised premises in accordance with the clauses of this Lease is in the opinion of the Lessor capable of being let by the Lessee and whether the same is let or not the Lessee will pay to the Lessor from the date determined by the Lessor as the date when the said area was or is capable of being let as aforesaid an additional yearly rent of a sum being that proportion of the yearly rent of FIFTY THREE THOUSAND THREE HUNDRED AND NINETY ONE POUNDS (£53,391) hereinafter mentioned which the said area capable of being let as aforesaid bears to the total area of the said building structures fixtures and improvements capable of being let as aforesaid.

(ii) AND after the said first three (3) years and during the residue of the term at the yearly rent (whichever be the greater) of FIFTY THREE THOUSAND THREE HUNDRED AND NINETY ONE POUNDS (£53,391) or a sum calculated at the first day of December in every year during the residue of the term for the ensuing year being that percentage of the Unimproved Capital Valuation of the freehold of the land hereby demised (made in pursuance of the Valuation of Land Act 1916, or of any act amending or in substitution for the same and current upon the said first day of December in every year during the residue of the term) which is equivalent to the total rate per centum determined by the Treasurer to be payable by the Lessor in terms of the Capital Debt Charges Act 1957, for the financial year ending on the thirtieth day of June prior to the said first day of December in every year during the residue of the term in respect of the Lessor's loan liability for interest, exchange, sinking fund contributions, flotation expenses, discount, loan management expenses and other charges plus one and one quarter per centum per annum (1¼% p.a.) PROVIDED that if at any time there be no such total rate or if such total rate be reduced below five per centum per annum (5% p.a.) then the yearly rent shall be a sum being that percentage of the Unimproved Capital Valuation of the freehold of the land hereby demised made as aforesaid which is equivalent to either of the following rates whichever be the greater:

(a) the nominal rate of interest applicable to the portion of the public loan with a currency of ten (10) years or over bearing the highest rate of interest last raised in Australia by the Commonwealth Government plus one and one quarter per centum per annum (1¼ p.a.); or

(b) the abovementioned total rate per centum determined by the Treasurer plus one and one quarter per centum per annum (1¼% p.a.)

PROVIDED that if upon the first day of December in any year during the residue of the term there shall be no Unimproved Capital Valuation of any part of the demised premises made in pursuance of the Valuation of Land Act 1916, or any Act amending or in substitution for the same then the Unimproved Capital Value of any such part thereof shall be deemed to be that sum which bears the same proportion to the Unimproved Capital Valuation of the residue of the demised premises made as aforesaid as the sum of THREE THOUSAND THREE HUNDRED AND NINETY ONE POUNDS (£3,391/–/–) bears to the sum of FIFTY THOUSAND POUNDS (£50,000/–/–), payable quarterly in advance at the office of the Lessor's Chief Property Officer, 19 York Street, Sydney aforesaid or elsewhere in Sydney to the Lessor as it may from time to time direct by equal quarterly payments on the first day of every month of December March June and September every year during the term the first of such payments having become due and payable on the first day of December One thousand nine hundred and sixty one PROVIDED that if the Lessor permits the Lessee to continue in occupation of the demised premises after the expiration of the said term the Lease shall continue as a tenancy from week to week only at a rent proportionate to the rent hereby reserved for the last year of the said term and subject to the following covenants conditions and restrictions hereof:

THE covenants and powers implied in every lease of land by virtue of Sections 84 and 85 of the Conveyancing Act 1919 as amended are hereby negatived and the special covenants and powers hereinafter contained are expressly substituted therefor.

THE Lessee covenants with the Lessor:

1. THAT the Lessee will during the said term pay unto the Lessor the rent hereby reserved in manner herein mentioned without any deduction whatsoever.

2. THAT the Lessee will during the said term pay any rate tax charge imposition fee assessment and any other outgoings whatsoever Commonwealth or State whether municipal local government parliamentary or of any other kind or nature which now or at any time during the term hereby created may be charged imposed levied or assessed upon the demised premises or upon the Lessor on account thereof.

3. THE Lessee shall within a period of four (4) years from the twenty seventh day of June One thousand nine hundred and sixty complete as hereinafter provided the erection placing or making upon the demised premises of the buildings structures fixtures and improvements shown in the preliminary drawings prepare by Messrs Peddle, Thorp and Walker, Architects, marked

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W.D.H. 1/1 to W.D.H. 3/1 inclusive, W.D.H. 4/4, W.D.H. 5/1 to W.D.H. 8/1 inclusive, W.D.H. 9 to W.D.H. 14 inclusive, W.D.H. 16, W.D. 5 to W.D. 15 inclusive, W.D. 18 to W.D. 21 inclusive and W.D. 24 which have been approved by the Lessor and have been identified under the Seals of the Lessor and the Lessee at the date of the execution of this Lease.

4. THE Lessee shall within the said period from time to time or as required by the Lessor and prior to the commencement of the erection placing or making of any such building structure fixture or improvement upon the demised premises submit for the approval of the Lessor complete detailed plans drawings (and specifications if so required by the Lessor) conforming to the requirements and bearing the approval of the City Council and all competent Authorities and conforming in principle to the said preliminary drawings and showing full details of any such building structure fixture and improvement and if required by the Lessor accompanied by design calculations of the said buildings structures fixtures and improvements and of the foundations thereof PROVIDED that the Lessee may submit such complete detailed plans drawings and specifications of stages in the erection placing or making of any such building structure fixture or improvement from time to time within the said period.

5. THE Lessee shall within the said period under the intermittent supervision and to the entire satisfaction of the Lessor erect place or make the said buildings structures fixtures and improvements upon the demised premises in all respects in accordance with the said detailed plans drawings and specifications and any conditions of the approval thereof and in accordance with such other detailed plans drawings and specifications as may be submitted by the Lessee or required by the Lessor and in either case approved by the Lessor and subject to any conditions of the approval thereof as shall be required by the Lessor and in accordance with all relevant ordinances regulations and by-laws and the lawful requirements of the Lessor such Council and Authorities.

6. THE Lessee shall upon the completion of the erection placing or making of the said buildings structures fixtures and improvements upon the demised premises as in this Lease provided and within three (3) months of such completion deliver to the Lessor two (2) certified sets of "work as executed" plans and drawings showing details of the work of erection placing or making of the said buildings structures fixtures and improvements upon the demised premises which shall include all amendments alterations and modifications of the said work which the Lessor may have permitted in accordance with this Lease in the course of the said work.

7. THE Lessee shall not at any time alter add to remove replace or reconstruct any building structure fixture or improvement at the commencement of the term hereof or thereafter erected placed or made upon the demised premises without the prior submission of plans specifications and drawings and the approvals provided for in Clause four (4) hereof and then only within

a time to be specified in writing by the Lessor and otherwise in accordance with the clauses of this Lease relating expressly or by implication to the erection placing or making of buildings structures fixtures or improvements upon the demised premises.

8. WITHOUT limiting the obligation of the Lessee under any other clause of this Lease the Lessee shall to the satisfaction of the Lessor protect the floors of the Upper Concourse Level of the demised premises and of those portions of the demised premises constituting the Ramp from Wynyard Lane to the Car Park and all Docks indicated on the said Drawings of Messrs Peddle, Thorp and Walker, Architects, marked W.D.H. 5/1 and W.D. 5 against damage to the said floors or any effect thereon deemed deleterious by the Lessor arising from fire oil grease petrol water or any other substance matter or thing capable of causing such damage or having such effect as aforesaid.

9. THE Lessee shall to the satisfaction of the Lessor and all competent authorities provide and maintain drainage for the Upper Concourse Level, and for the said Ramp and Docks in the preceding clause referred to in such a manner that no water fluid oil grease petrol or any other substance matter or thing shall enter into the drains vents pits pipes or into any other facility whatsoever of the Lessor AND clause Twenty three (23) of this Lease shall be read subject to this clause and shall not entitle the Lessee to use any drain vent pit pipe or other facility whatsoever of the Lessor for the drainage of the said Upper Concourse Level Ramp and Docks BUT this Clause shall not limit the obligations of the Lessee under any other clause of this Lease.

10. THE Lessee shall subject to the intermittent supervision and to the entire satisfaction of the Lessor and (where required by the Lessor the local council and any competent authorities) in accordance with plans specifications and drawings previously approved by the Lessor such council and authorities and in accordance with any conditions of such approval and in accordance with all relevant ordinances regulations and by-laws and the lawful requirements of the Lessor such council and authorities erect place and make the buildings structures fixtures and improvements provide the services and facilities and carry out all work provided for in Schedule One hereto within such time from the commencement of the term of the Lease as the Lessor shall specify in writing and otherwise as provided in the said Schedule.

11. THE Lessee shall comply with the Construction Conditions for Buildings on Railway Property which are set out in Schedule Two hereto. The said Construction Conditions impose additional obligations upon the Lessee and shall not be construed so as to limit in any manner any obligation of the Lessee under this Lease. The expression the "building" or "buildings" wherever used therein shall include any structure fixture or improvement.

12. AND that the Lessee will during the said term well and sufficiently repair maintain pave cleanse amend and keep the demised premises in good and substantial repair and condition in all respects when where and so often as

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need shall be and replace all fixtures improvements and things therein or thereon (but except as provided in any other provision of this Lease relating to the demised premises not replace the building itself) which shall during the term become worn out broken damaged beyond repair with new and suitable ones in keeping with the demised premises and approved by the Lessor AND will also make and carry out any cleasing and any amendment alteration repair renovation addition or other work whether structural or otherwise which by virtue of any provision of any law statutory or otherwise having application thereto now or hereafter in force may be required to be made or carried out by either the Lessor or the Lessee in or upon the demised premises.

13. THAT the Lessee will in every third year or at longer intervals if approved by the Lessor during the continuance of this Lease or at shorter intervals if so required by any civic licensing local public or statutory authority (hereinafter called the said authority) by the use or application in a workmanlike manner of water proof paint or other waterproofing material or two coats of proper oil paint or any other material acceptable to the Lessor and the said authority protect preserve or renovate that exterior part of the demised premises which was originally painted or should be painted.

14. THAT the Lessee will in every fifth year or at longer intervals if approved by the Lessor during the continuance of this Lease or at shorter intervals if so required by the said authority by the use or application of paint or any other material acceptable to the Lessor and the said authority protect preserve or renovate the inside wood iron and other work of the demised premises in a workmanlike manner and repaper with paper or otherwise protect preserve or renovate with material of a good and substantial quality and type acceptable to the Lessor and the said authority such part of the demised premises as should be papered or otherwise covered protected preserved or renovated and also will wash stop whiten or colour such part of the demised premises as may be plastered.

15. THAT it shall be lawful for the Lessor or any person duly authorised on its behalf at any time during the said term without giving to the Lessee any previous notice to enter upon the demised premises and take a schedule of all fixtures improvements and things therein or thereon and examine the state of construction repair and other the condition of the demised premises AND all wants of repair and other the condition of the demised premises which upon any examination shall be found contrary to any covenant of the Lessee and for the amendment or reparation of which notice in writing shall be left at the demised premises or served on or posted to the Lessee at his usual address or place of address last known to the Lessor the Lessee WILL within a reasonable time after the service or posting of every such notice in a workmanlike manner remedy or make good accordingly.

16. THAT the Lessee will in a workmanlike manner and with the best materials to the satisfaction of the said authority at any time or from time to

time during the said term forthwith whenever the same shall be required or notified by the said authority or on being informed by the Lessor of such requirement or notification (and whether such requirement or notification be made upon or notified to the Lessor or the Lessee) forthwith execute and do or cause to be executed and done internally or externally any such amendment alteration repair renovation addition or other work whether structural or not and such cleansing using or application of paint or any other material acceptable to the said authority or papering for the covering protection preservation or renovation of the demised premises and any matter thing or convenience for the time being on the demised premises as the said authority shall require or notify.

17. AND without limiting the obligation of the Lessee under any other provision of this Lease the Lessee further covenants with the Lessor that if the Licensing Court makes any order under section 40A (1) of the Liquor Act 1912 or any amendment or extension thereof or any other like provision affecting the demised premises and the Lessor notifies the Lessee that he does not intend to carry out in accordance with the said order the work so ordered then the Lessee shall immediately on being notified by the Lessor make application to the Licensing Court and obtain the necessary authority to carry out and shall forthwith carry out such work in accordance with such order.

18. THAT the Lessee will at the expiration or sooner determination of the term hereof peacably surrender and yield up unto the Lessor the demised premises in good and substantial repair and condition and otherwise in a condition consonant with the full performance and observance of the covenants conditions and restrictions in this Lease on the part of the Lessee to be performed and observed and with the Lessee's use of the demised premises in accordance therewith.

19. THAT the Lessee will forthwith insure the demised premises to the full insurable value in the joint names of the Lessor and the Lessee in such insurance office as the Lessor shall approve from loss damage or injury caused by fire and will during the erection and construction and upon the completion of any part of the demised premises as shall be erected or constructed on in under over through or along the demised premises in pursuance of this Lease likewise insure such part of the demised premises to the full insurable value thereof in the joint names of the Lessor and the Lessee in such insurance office as the Lessor shall approve and will during the said term duly renew or keep up any such insurance as aforesaid and will whenever required produce to the Lessor the policy of such insurance and the receipt for the premium for the then current year and will during the last ten years of the Lease hereby granted hand any said policy of insurance to the Lessor together with the receipt for each annual premium AND if at any time or from time to time the Lessee fail or omit to pay when due any premium of such insurance it shall be lawful for the Lessor to pay the same and any sum

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so paid by the Lessor for insurance shall be a debt due and owing by the Lessee to the Lessor and payable upon demand AND FURTHER that in the event of the demised premises being destroyed or damaged by fire then and so often as the same shall happen the whole of the moneys payable in respect of any such insurance shall forthwith be paid to the Lessor and shall be made available to the Lessee as in Clause Twenty one (21) hereof provided.

20. THAT the Lessee will forthwith insure all plate glass in the demised premises to the full insurable value in the joint names of the Lessor and the Lessee in such insurance office as the Lessor shall approve against breakage and damage howsoever caused and will during the erection and construction and upon the completion of any part of the demised premises as shall be erected or constructed on in under over through or along the demised premises in pursuance of this Lease wherein any plate glass has been installed likewise insure such plate glass to the full insurable value thereof in the joint names of the Lessor and the Lessee in such insurance office as the Lessor shall approve and will during the said term duly renew or keep up any such insurance as aforesaid and will whenever required produce to the Lessor the policy of such insurance and the receipt for the premium for the then current year and will during the last ten years of the Lease hereby granted hand any said policy of insurance to the Lessor together with the receipt for each annual premium AND if at any time or from time to time the Lessee fail or omit to pay when due any premium of such insurance it shall be lawful for the Lessor to pay the same and any sum so paid by the Lessor for insurance shall be a debt due and owing by the Lessee to the Lessor and payable upon demand AND FURTHER that in the event of the said plate glass being broken or damaged from any cause then and so often as the same shall happen the whole of the moneys payable in respect of any such insurance shall forthwith be paid to the Lessor and shall be made available to the Lessee as in Clause Twenty one (21) hereof provided.

21. THAT in case the demised premises shall be destroyed or damaged by any means the Lessee will immediately proceed with the work of well and substantially rebuilding repairing and reinstating the same to the satisfaction of the said authority and the Lessor and in accordance with any provision of any law statutory or otherwise having application thereto PROVIDED THAT any plan drawing and specification of such rebuilding repairing or reinstating shall be first approved by the Lessor or an officer or person appointed by it for that purpose and during the erection or construction and upon completion of such rebuilding repair or reinstatement any provision herein contained relating to and governing insurance shall apply AND PROVIDED ALSO that for the purposes of any such rebuilding repairing or reinstating all or any money recovered or received by the Lessor in respect of any insurance effected under covenants Nineteen (19) and Twenty (20) hereof shall be made available to the Lessee as required by the Lessee by progress payments during such rebuilding or reinstatement.

22. THAT the Lessee will not do or make any act or omission whereby the existing or any future insurance upon the demised premises may be invalidated or prejudicially affected in any manner whatsoever.

23. THAT the Lessee will at any time or from time to time during the said term pay to the Lessor a reasonable share and proportion of and towards the cost and expense of making supporting cleansing or repairing any party wall sewer drain or other thing of any nature which now or at any time during the said term shall be used in common with any other building or land and such proportion shall be ascertained by the Lessor and paid by the Lessee to the Lessor on demand having regard to the use thereof by the Lessee or any Sub-lessee.

24. THE Lessee shall not except where expressly provided in this Lease use any water gas electricity heat air or other service of the Lessor or any installation matter or thing associated with such service.

25. THAT it shall be lawful for the Lessor or any officer or person authorised by it at any time or from time to time to come into or upon the demised premises or to do anything whatsoever for any railway purpose and the decision of the Lessor as to what constitutes a railway purpose shall be final and binding upon the Lessee PROVIDED THAT the Lessor will repair and make good any damage done to the demised premises and to any fitting or equipment of the Lessee and/or its Sub-lessee or Sub-lessees therein resulting from the doing of any such work and will as far as in its opinion its or public convenience or requirements and the due proper and economical execution or performance of any work will permit refrain from causing unreasonable inconvenience to or interference with the Lessee or his Sub-lessee.

26. THAT the Lessee or his sub-lessee will not during the said term assign transfer demise sublet licence or part with the possession of the demised premises or by any act or deed procure the demised premises to be assigned transferred demised sublet licensed or put into the possession of any person without the consent in writing of the Lessor first had and obtained PROVIDED FURTHER that in the event of the granting of any such consent in respect of that part of the demised premises which is now or may hereafter be licensed or otherwise authorised under any law statutory or otherwise having application to the use or conduct of any building premises or place as and for the trade or business of a licensed or otherwise authorised victualler hotelkeeper innkeeper or publican or retailer of any spirit wine spirituous or alcoholic or other liquor or as and for a place for the reception accommodation or entertainment of any traveller guest or other person (such part of the demised premises being hereinafter included in the expression "licensed premises" and such licence permission or other authority allowing permitting or otherwise authorising the conduct or carrying out of any such trade business purpose or use being hereinafter included in the expression "licence or other authority") the Lessee shall at his own expense arrange for the intending assignee transferee or sub-lessee to enter into and execute a Power

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of Attorney in respect of any licence or other authority similar to that hereinafter contained or otherwise suitable and acceptable to the Lessor and no assigning transferring or subletting hereunder shall be complete or effective until the written consent thereto of the Lessor shall have been obtained and so far as regards any part of the demised premises so licensed or authorised the said Power of Attorney from the assignee transferee or sub-lessee shall have been duly executed and delivered to the Lessor without any expense to the Lessor PROVIDED FURTHER that it will not be a breach of this covenant by the Lessee for him or his sub-lessee to assign transfer demise sublet or part with the possession of any portion of the demised premises having an area of one thousand one hundred square feet or less if he has the consent of the Lessor to the kind of business to be carried on therein PROVIDED FURTHER that the Lessor will not unreasonably withhold consent to any mortgage of this lease whether by way of assignment transfer sub-lease or otherwise AND PROVIDED ALSO that for any consent of the Lessor given in respect of anything included in this covenant no fine or sum of money in the nature of a fine will be payable by the Lessee or his sub-lessee but the Lessor will not be precluded from requiring the payment of legal costs or any other expenses reasonably incurred in relation to any such consent.

27. THE Lessee covenants that at all times during the said term that any publican's licence held in respect of the demised premises shall not be held by the Lessee of the demised premises, but shall be held by a person who is not the lessee, sub-lessee, under-lessee or assignee of such lessee, sub-lessee, or under-lessee and who has no estate or interest of any kind whatsoever in the demised premises or any part thereof and who pays no rent to any person in respect of the demised premises or any part thereof AND in the event of the said publican's licence being held by any person contrary to the foregoing provisions of this clause the Lessee will upon the happening of such event forthwith cease to use the said demised premises for the trade or business of a licensed publican until such time as the said publican's licence is again held by a person as herein stipulated.

28. THAT upon every permitted assignment transfer or subletting of the demised premises the Lessee within one calendar month after the execution of the deed or other instrument effecting such assignment transfer or subletting will give to the Lessor notice in writing thereof specifying in such notice the name and residence of the assignee transferee or sub-lessee and will if required forward an attested copy of the said deed or other instrument effecting such assignment transfer or subletting to the office of the Lessor or of the Lessor's Chief Property Officer or of such other officer or person as may at any time or from time to time be required by the Lessor AND will also procure the execution by the assignee transferee or sub-lessee as the case may be of any covenant relating to the performance of the Lessee's covenants in this lease which the Lessor may at any time or from time to time require.

29. THAT the Lessee will not use exercise or carry on in or upon the demised premises below the roofs of the Lessor's passageways the business of a newsvendor or bookseller or vendor of any magazine, periodical or publication whatsoever AND the Lessee will not use exercise or carry on in or upon the demised premises any noxious noisome or offensive trade or objectionable user or any trade or user providing harbourage to rats or any other species of vermin AND will not use exercise or carry on in or upon the demised premises any art trade business occupation or calling without having obtained the previous approval thereof in writing of or on behalf of the Lessor which approval shall not be unreasonably withheld nor will he use exercise or carry on thereon or therein any art trade business occupation or calling after receiving notice in writing from or on behalf of the Lessor of objection thereto nor will he use the demised premises in any manner nor for any purpose which the Board of Fire Commissioners of New South Wales or any other person or authority or the Lessor informs him in writing that they or any of them consider may cause or create an unreasonable fire hazard and the Lessee shall immediately upon being requested in writing so to do by the said Board person or authority or the Lessor cease to use or cause the use of the demised premises in the manner or for the purpose mentioned or described in such notice and remove therefrom any material thing or article which he may in any such notice be required so to do and will at any time or from time to time take and continue effective steps for keeping the demised premises clear of rats mice white ants wood borers and all other species of vermin and will not hold in or upon the demised premises any auction sale and no act matter or thing whatsoever shall at any time during the continuance of this Lease be done in or upon the demised premises which will or may be or grow to the annoyance nuisance grievance damage or disturbance of the Lessor or the public or any occupier or owner of any neighbouring premises or which may cause or create an unreasonable fire hazard AND the decision of the Lessor as to what is a noxious noisome or offensive trade or objectionable user or disapproved or unapproved art trade business occupation or calling or whether any trade or business provides harbourage to rats or any other species of vermin or what is attractive to rats mice white ants wood borers or any other species of vermin or as to what causes or creates an unreasonable fire hazard shall be accepted by the Lessee as final and conclusive PROVIDED THAT the Lessor in the exercise of any power or authority under or in making any decision in respect of this covenant will not act arbitrarily but as far as in its opinion its or public convenience or requirements may permit will refrain from causing unreasonable inconvenience to or inteference with the Lessee or his sub-lessee.

30. THE Lessee shall not without having first obtained the written consent of the Lessor place construct or erect upon the demised premises or post paint or otherwise affix thereto any displays advertising hoardings posters signs devices or other advertising media other than the advertising media relating or applicable to any trade or business at any time or from time to

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time carried on in or upon the demised premises PROVIDED that the Lessor in the exercise of any power or authority under or in making any decision in respect of this covenant will not act arbitrarily but as far as in its opinion its or public convenience or requirements may permit will refrain from causing unreasonable inconvenience to or intereference with the Lessee or his sub-lessee.

31. THAT the Lessee will not without the approval of the Lessor which approval shall not be unreasonably withheld install nor permit the installation of any air compressor steam boiler or machinery of any kind upon the demised premises and if with such approval any air compressor steam boiler or machinery be installed the Lessee will forthwith insure it or them against fire explosion collapse or other accident or damage to the full value thereof in a public insurance office to be approved by the Lessor and keep the same so insured during the currency of this Lease and will upon request by the Lessor produce to it or to such officer or person as may be deputed for the purpose the policy for such insurance and any receipt for the renewal thereof.

32. THE Lessee shall not install maintain or use on the demised premises any radio wireless or television receiving or transmitting apparatus except with the consent in writing of the Lessor first had and obtained and subject to the conditions in such consent contained.

33. THAT upon the expiration by effluxion of time or other sooner determination of this Lease the Lessee shall if required by the Lessor close at his own expense and to the satisfaction of the Lessor any means of access then existent between the demised premises and any premises not owned by the Lessor.

34. THAT with the exception of any building or part of a building erected made or constructed pursuant to any permission given by the Lessor under or by virtue of the Transport (Division of Functions) Act 1932 (which building as provided by the said Act shall be so constructed as to leave a clear space of not less than twenty feet (20' 0") above the surface of the roadway of Wynyard Lane as indicated on plan "A" hereto annexed and as not to impede or restrict pedestrian or vehicular traffic in and along such Lane) no building structure or fixture other than any awning or other projection beyond the building line which the said authority may permit to remain now or hereafter erected on the demised premises shall project beyond the building line of any street or lane.

35. THE Lessee shall not without the written consent of the Lessor permit upon the Upper Concourse Level (shown on plan "G" hereto annexed) of the demised premises any vehicle the loaded weight whereof exceeds a three (3) ton axle loading.

36. THE Lessee shall save harmless and keep indemnified the Lessor from and against all loss liability costs charges and expenses and all manner of

actions suits proceedings controversies claims and demands of whatsoever nature or kind and howsoever sustained or occasioned which the Lessor may suffer or incur or to which the Lessor now is or may hereafter become subject or liable and which arise from or are in any way connected with or incidental to the occupation or use by the Lessee of the demised premises during the term or subsequently thereto if the Lessee is still in possession or the proximity of the demised premises to the railway or the presence upon the demised premises or the leakage issue or flow therefrom or thereinto of rain flood or other water smoke fumes vapour gas electricity fire or any harmful agent whatsoever AND the Lessee shall accept all responsibility in connection therewith PROVIDED that the Lessee shall not be liable to indemnify the Lessor under this clause in any case where the negligence of the Lessor his servants or agents in any case where the negligence of the Lessor his servants or agents is the sole cause of such loss liability costs charges expenses actions suits proceedings controversies claims and demands.

37. THAT the Lessee without limiting his obligation under the preceding provision shall not have right of action suit proceeding claim or demand against the Lessor by reason of the execution by the Lessor during the said term of any work in the vicinity of or upon or within the demised premises connected with any alteration of level (including that of any public way) incidental to or consequent upon the widening duplication deviation or other alteration of any railway track of the Lessor or connected with any alteration or addition to the said railway or any tunnel passageway or subway AND the Lessor shall be at liberty to carry out any such work during the said term as fully and effectually as if this Lease had not been granted PROVIDED THAT the Lessor will repair and make good any damage done to the demised premises resulting from the doing of any such work and will as far as in its opinion its or public convenience or requirements and the due proper and economical execution or performance of any work will permit refrain from causing unreasonable inconvenience to or interference with the Lessee or his Sub-lessee.

PROVIDED FURTHER that this clause shall not operate to prevent the Lessee or any Sub-lessee from recovering and receiving any compensation to which it or they may otherwise be lawfully entitled under this clause AND PROVIDED FURTHER that nothing in this clause contained shall in any way effect the interpretation of any other part of this Lease.

38. AND THAT the Lessee without limiting his obligation under Clauses 36 and 37 of this Lease will (but subject to the provisos thereto) not make any claim against the Lessor for loss damage or depreciation in any way consequent upon the exercise by the Lessor any passenger licensee officer servant or workman or any person authorised by it of any right of way privilege right and easement hereby reserved.

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39. THAT the Lessee will at any time or from time to time when required by the Lessor render the Lessor's passageways immune from fire by providing at any opening on any common boundary of the Lessor's passageways and the demised premises such isolating door or shutter or any other protection which the Lessor or the said authority may require AND the Lessee will carry out such work and take such measures (including the installation of fire fighting appliances) for the protection of the demised premises against fire as the Lessor or the said authority may direct.

40. THAT if and while the Lessee during the continuance of this Lease exercises or carries on in or upon the licensed premises the trade or business of licensed or otherwise authorized victualler hotel keeper innkeeper or publican or retailer of spirit wine spirituous or alcoholic or other liquor or otherwise uses the licensed premises solely as and for a place for the reception accommodation or entertainment of any traveller guest or other person (such trade business purposes or use or any of them being hereinafter included in the expression "the business of a hotelkeeper") he will exercise and carry on the said business in a proper quiet and orderly manner and so as not to afford any ground for any licence or other authority for the licensed premises being withdrawn or withheld from the licensed premises and will not do commit permit or omit on the licensed premises any act matter or thing whatsoever the doing commission permission or omission of which may either alone or in conjunction with the doing commission permission or omission of any other act matter or thing directly or indirectly render any licence or other authority liable to be taken away withheld suppressed suspended forfeited lost or cancelled or become void or voidable in any manner howsoever or a renewal of any licence or other authority refused or directly or indirectly render the licensed premises liable to disqualification from being used for the said business AND will do any act matter or thing necessary for keeping any licence or other authority in existence and will not without the previous consent in writing of the Lessor transfer remove or part with the possession of any licence or other authority AND the Lessee shall arrange for or procure that all and every holder of any licence or other authority including the present holder thereof shall abide by observe and perform any such term provision and condition of this covenant as is applicable to him and the Lessee shall immediately obtain from the present holder of any licence or other authority and contemporaneously with any assignment transfer or other setting over of any licence or other authority obtain from each new licensee a written undertaking in favour of the Lessor whereby such new licensee shall be bound to observe and perform every term provision and condition contained and described in this covenant and applicable to such new licensee.

41. THAT if and while the Lessee during the continuance of this Lease exercises or carries on in or upon the licensed premises the business of hotel keeper he will apply for and endeavour to obtain any licence or other authority or renewal thereof as is or may be necessary for using the licensed

premises for the said business AND for that purpose will at least sixty days prior to the date of expiration of any licence or authority or renewal thereof sign and execute in proper form any necessary application for any licence or other authority or renewal thereof and duly lodge the same as required by any provision of any law statutory or otherwise having application thereto AND will appear at or before the Licensing or other proper Court or authority or person on any application for renewal or transfer of any licence or other authority and will use his endeavours to procure such renewal or transfer and will abstain from any opposition direct or indirect to such application AND the Lessee will immediately upon any such renewal being granted take up any Certificate or other document authorising or directing the renewal of any licence or other authority from the Licensing or other Court or other authority officer or person and forthwith lodge the same at the Treasury or elsewhere as required by any provision of any law statutory or otherwise having application thereto and will thereupon pay to the Treasurer or other officer appointed for that purpose the necessary fee for the issue or renewal of any licence or other authority or otherwise do or omit or cause to be done or omitted whatever may be required by any provision of any law statutory or otherwise having application thereto to be done or omitted in the circumstances AND if the Lessee should fail to take up or lodge any such certificate or other document or pay any such fee at the time hereinbefore mentioned or otherwise to do or omit or cause to be done or omitted whatever may be required by any provision of any law stautory or otherwise having application thereto to be done or omitted in the circumstances then it shall be lawful for the Lessor or any officer or person deputed by it for the purpose to take up or lodge such certificate or other document or pay such fee or otherwise to do or omit or cause to be done or omitted whatever may be required by any provision of any law statutory or otherwise having application thereto to be done or omitted in the circumstances and any fee and all the Lessor's costs and expenses in relation to any licence or other authority shall on demand in writing by the Lessor be paid to the Lessor by the Lessee AND the Lessee shall Thirty five (35) days at least before the expiration or other sooner determination of this Lease or of any renewal or extension thereof or before the expiration of any notice given to the Lessor by the Lessee of his intention of ceasing to exercise or undertake in or upon the licensed premises the said business sign and give or cause to be signed and given such notice of a renewal or transfer of any licence or other authority as may be required by any provision of any law statutory or otherwise having application thereto and allow such notice of a renewal or transfer of any licence or other authority as may be required by any provision of any law statutory or otherwise having application thereto to be affixed to the licensed premises to be thereto affixed and remain so affixed during such time as shall be necessary or expedient in that behalf and generally shall do and perform any such act deed matter and thing as shall be necessary to enable the Lessor or any person nominated or authorised by the Lessor to obtain the renewal of any licence or other authority or any new licence or other authority or the transfer of any licence

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or other authority then existing or in force and will at the expiration of any notice given to the Lessor by the Lessee of his intention of ceasing to exercise or undertake in or upon the licensed premises the said business or at the expiration by effluxion of time or other sooner determination of this Lease hand over to the Lessor or the Lessor's nominee any licence or other authority which shall absolutely belong to the Lessor subject to the payment by the Lessor to the Lessee of a due proportion of any fee therefor for the unexpired term of any licence or other authority AND the Lessee shall arrange for or procure that all and every holder of any licence or other authority including the present holder thereof shall abide by observe and perform every such term provision and condition of this covenant as is applicable to him and the Lessee shall immediately obtain from the present holder of any licence or other authority and contemporaneously with any assignment transfer or other setting over of any licence or other authority obtain from each new licensee an undertaking in favour of the Lessor whereby such new licensee shall be bound to observe and perform every term provision and condition contained and described in this covenant and applicable to such new licensee and shall forthwith hand such undertaking to the Lessor or any officer or person deputed by it for the purpose.

42. THAT if and while the Lessee during the continuance of this Lease exercises or carries on in or upon the licensed premises the business of a hotelkeeper the Lessor or the Lessor's Chief Property Officer or such other officer or person as may at any time or from time to time be deputed by the Lessor for the purpose shall at any time or from time to time be of opinion that the Lessee has been guilty of any breach of or default under any covenant condition or agreement herein contained or implied which may be likely to endanger or injure any licence or other authority or if any licensee for the time being of the licensed premises shall do or omit to do or suffer to be done or omitted anything which had it been done or omitted or been suffered to be done or omitted by the Lessee would have been a breach or non-observance or non-performance of any covenant herein contained or implied regarding any licence or other authority or use of the licensed premises for the said business and the Lessor is of the opinion that the Lessee in the event of the licence or other authority for the licensed premises being declared void or cancelled or lapsing or being lost or taken away or a renewal of it being refused is unlikely to be able to obtain a licence or other authority new renewed or substituted for the licensed premises or to pay the sum hereinafter fixed in respect of the licence or other authority for the premises then the Lessor may obtain exparte or otherwise an interim mandatory injunction or any other authority for giving entry to and possession to the Lessor's Chief Property Officer or any officer or person deputed by the Lessor for the purpose of the demised premises or may obtain the appointment ex parte and without security of an interim receiver or manager or receiver and manager of the demised premises or of any licence or other authority or of the said or any other business or may obtain a judg-

ment for ejectment of the Lessee from the demised premises subject to a subsequent adjustment of rights PROVIDED ALWAYS that the Lessor shall not be liable in damages for any bona fide mistake.

43. THAT if and while the Lessee during the continuance of this Lease exercises or carries on in or upon the licensed premises the business of a hotelkeeper any provision of any law statutory or otherwise now in force or which shall at any time hereafter during the continuance of this Lease come into force having application to any postponement of the date for repayment by a licensee of any rent or other money payable by him in respect of his licensed or otherwise authorised premises or in any way limiting any power or remedy of the Lessor under these presents is hereby expressly excluded.

44. THAT if and while the Lessee during the continuance of this Lease exercises or carries on in or upon the licensed premises the business of a hotelkeeper he without qualification of his liability for any breach of any covenant condition and restrictions herein contained or implied doth hereby irrevocably appoint the Lessor and the Lessor's Chief Property Officer or such officer or person as may from time to time be deputed by the Lessor for the purpose jointly and each of them severally his Attorneys and Attorney in the name of the Lessee and on his behalf to give sign publish execute date and perfect any notice deed summons application request consent authority appointment transfer memorandum sub-lease surrender assignment or other document or admission relating to any lease or licence or other authority issued or held in respect of the licensed premises or any other document in exercise of any covenant condition or restriction in this Lease contained or implied relating to any licence or other authority and for the Lessee and in his name and on his behalf to sign complete date or lodge any application for any licence or other authority or any renewal thereof and also to appear for him at or before the Licensing or any other Court or any other authority or person or to appoint a Solicitor to appear and make such application to the said Court authority or person for him in his name and on his behalf as may seem necessary and expedient to the Lessor or the Lessor's Chief Property Officer or such officer or person as may from time to time be deputed by the Lessor for the purpose and otherwise to use their and his best endeavours to obtain any licence or other authority or renewal of any licence or other authority for the licensed premises AND ALSO for him and in his name and on his behalf to take up and lodge any such certificate or other document authorising or directing the renewal of any licence or other authority and to pay any fee as aforesaid to the Treasurer or other proper authority officer or person and to take up and receive for him or other the person entitled thereto every licence or other authority or renewal thereof and to appoint a Solicitor to appear for the Lessee in any Court or before any authority or person and in his name and on his behalf to request apply for consent or submit to any transfer removal or renewal of any licence or other authority or to any negative or mandatory

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interim injunction or appointment of receiver or manager or receiver and manager with security or to judgment in an ejectment action brought by the Lessor for the purpose of protecting any licence or other authority or for enforcing any positive or negative covenant herein contained or implied relating to any licence or other authority and generally to do sign execute carry out carry on or conduct consent to or dissent from in the Lessee's name and on his behalf any act thing trade document or transaction which the Lessee has herein covenanted or agreed to do sign execute carry out carry on conduct or transact relating to any licence or other authority and to appoint or remove any substitute for or agent under any such attorney with such of the said powers as the attorney shall delegate to such substitute or agent and generally to act as effectually as the Lessee could do and the Lessee doth hereby ratify and confirm and agree to ratify and confirm any such act deed matter and thing and to recover from the Lessee any costs and expense of so acting as rent payable immediately under these presents together with interest thereon at the rate of ten per centum (10%) per annum until payment.

45. THAT if and while the Lessee during the continuance of this Lease exercises or undertakes in or upon the licensed premises the business of a hotelkeeper he will not at any time revoke the Power of Attorney herein contained or any power authority or licence hereby given or any other power authority or licence of the Lessor or the Lessor's Chief Property Officer for the time being or its his or their agent or of any officer or person deputed by the Lessor as aforesaid or do or permit or suffer to be done or permitted any act deed matter or thing whereby the said Power of Attorney or other power authority and licence or any of them may become void or of no effect.

46. THAT the Lessee will contemporaneously with the delivery to him of this Deed of Lease hand to the Lessor or his Solicitor an irrevocable Power of Attorney from the person at the time holding the publican's licence or any other licence or authority in respect of the licensed premises in terms as similar as possible to those of the Power of Attorney herein granted by the Lessee appointing the Lessor and the Lessor's Chief Property Officer for the time being or another officer or person deputed by the Lessor jointly and each of them severally the attorneys and attorney of the person holding any abovementioned licence or other authority.

47. THAT if and while the Lessee during the continuance of this Lease exercises or undertakes in or upon the licensed premises the business of a hotelkeeper he will whenever and so frequently as any licence or other authority which is now or shall hereafter be held or granted in respect of the licensed premises is assigned or transferred to another licensee or by any other means becomes held by another licensee immediately upon such assignment transfer or change becoming effective procure from the new licensee an irrevocable Power of Attorney in terms as similar as possible to those of the Power of Attorney herein granted by the Lessee appointing the Lessor and the Lessor's Chief Property Officer for the time being or another officer or person deputed

by the Lessor jointly and each of them severally his attorneys and attorney.

48. THAT on each and every occasion on which the Lessee shall for a period which the Lessor or the Lessor's Chief Property Officer or such officer or person as may from time to time be deputed by the Lessor for the purpose considers unreasonable omit or neglect to pay moneys or to erect or construct any building or effect any alteration addition repair covering protection preservation renovation painting papering washing stopping whitening colouring or cleansing or to do any thing which the Lessee has herein covenanted to pay erect construct effect or do then it shall be lawful for but not obligatory upon the Lessor and without prejudice to any right and power arising from such default to pay such money or to erect construct or effect such building alteration repair covering protection preservation painting papering washing stopping whitening colouring or cleansing or effect or do such things as if it were the Lessee and for the purpose thereof the Lessor or its architect contractor or its his or their workman or other agent is hereby authorized to enter return go pass or repass with or without any means of conveyance or transportation or any manner of tool material appliance article or thing at any reasonable time upon the demised premises and there to remain for the purpose of erecting or constructing such building or effecting such alteration addition repair covering protection preservation renovation painting papering washing stopping whitening colouring or cleaning or doing such thing and the Lessor may recover from the Lessee the amount so expended and the cost of the erection or construction of such building or the effecting of such alteration addition repair covering protection preservation renovation painting papering washing stopping whitening colouring or cleansing or doing such thing with interest at the rate of ten pounds per centum per annum from the time of such expenditure until payment and the Lessor for the recovery of the same shall have in addition to a right of action any remedy hereby or by any provision of any law statutory or otherwise having application thereto given for the recovery of the rent hereby reserved.

49. THAT the Lessee will continue to exercise or carry on in or upon the licensed premises the business of a hotelkeeper under or by virtue of the publican's licence of the Lessor held by or on behalf of the Lessee at the time of the execution hereof or any renewal thereof or any new or substituted licence or other authority obtained or held by or on behalf of the Lessee in the place thereof but in case he may at any time desire to cease so to exercise or carry on such business he may give to the Lessor in writing as long notice as practicable but at the least six months' notice to expire during the currency of the said licence or other authority or any renewal thereof or of any new or substituted licence or other authority obtained or held by or on behalf of the Lessee in the place thereof of his intention of ceasing so to exercise or carry on such business and upon the expiration of such notice or upon the complete and effectual performance by or on behalf of the Lessee of any transfer handing over or other act in relation to the licence or other authority required of the Lessee by the Lessor under this lease and upon the observance

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and performance otherwise of any covenant on his part in relation to the said licence or other authority whichever shall be the later the provisions of this Lease relating to the licence or other authority and to the exercise or carrying on in or upon the licensed premises of the business of a hotelkeeper will not except as hereinafter provided be binding upon the Lessee who will then except as hereinafter provided have no future duty obligation or liability under them PROVIDED THAT any notice by the Lessee of his intention of ceasing to exercise or carry on such business shall immediately become of no force or effect for any purpose whatsoever if for any reason during the period of notice the licence or other authority shall be taken away withheld suppressed suspended forfeited lost or cancelled or become void voidable or disqualified for renewal AND PROVIDED FURTHER that if at any time the Lessee having acted in the manner hereinbefore described has ceased to carry on the business of a hotelkeeper upon the demised premises indicates to the Lessor by notice in writing that it desires to recommence the business of a hotelkeeper on the demised premises and duly observes and performs all necessary acts and requirements on its part to be observed and performed under the Liquor Act 1912 as amended or any Statutory enactment amending or replacing the same then the Lessee shall be entitled to make application for a further licence or other authority and in the event of the grant thereof may recommence the said business subject to the provisions of this Lease relating to the said licence or other authority.

50. THAT if possession be not given up by the Lessee to the Lessor on the expiration by effluxion of time or sooner determination of the Lease hereby created it shall be competent for the Lessor to sue for and receive any rent due and in addition or separately a sum for use and occupation calculated at the same rate as the rent herein reserved as though for rent due and these things may be done without waiving or otherwise in any manner affecting any notice to quit or any proceedings for obtaining possession.

51. THAT in case the Lessee shall be wound up by Order of a Court or go into voluntary liquidation otherwise than for the purpose of reconstruction the Lessor may re-enter upon the demised premises or any part thereof in the name of the whole and thereby determine the estate of the Lessee therein but without releasing him from liability in respect of any non-payment or default.

52. THAT if the rent hereby reserved or any part thereof is in arrear for the space of twenty-one (21) days (although no formal demand therefor has been made) or in case default is made in the fulfilment of any covenant condition or restriction herein contained whether expressed or implied and on the part of the Lessee or of any holder of any licence or other authority for the licensed premises or any part thereof to be performed or observed the Lessor may serve upon the Lessee a notice requiring payment of rent or if any default other than payment of rent is in the opinion of the Lessor capable of remedy requiring the Lessee to remedy the same and in case the Lessor claims compensation in money for any default requiring the

Lessee to pay the same and the Lessee fails within a reasonable time thereafter to pay such rent or to remedy such default or where compensation in money is required to pay reasonable compensation to the satisfaction of the Lessor the Lessor may re-enter upon the demised premises or any part thereof in the name of the whole and thereby determine the estate of the Lessee therein but without releasing him from liability in respect of any non-payment or default PROVIDED HOWEVER that if the licence or other authority for the licensed premises has been declared void or has been cancelled or has lapsed been lost or taken away or a renewal of it refused and the same constitutes the breach of any covenant condition or restriction herein contained or implied and on the part of the Lessee or of any holder of any licence or other authority for the licensed premises or any part thereof to be performed or observed and the Lessee within six months after the happening of any such event obtains a licence or other authority new renewed or substituted for the licensed premises or having used his best endeavours has been unable to obtain a licence or other authority new renewed or substituted for the licenced premises and pays to the Lessor the sum of twenty-five thousand pounds (£25,000/-/-) as an amount agreed upon for this purpose only as the value of the licence or other authority for the licensed premises no right of re-entry shall accrue to the Lessor in respect of the said licence or other authority for the licensed premises having been declared void or having been cancelled or having lapsed been lost or taken away or a renewal of it having been refused.

53. THAT any licence or other authority new renewed or substituted for the licensed premises obtained by the Lessee for replacing any licence or other authority for the licensed premises declared void or cancelled or which has lapsed been lost or taken away or of which a renewal has been refused shall be subject in all respects to any provision of this Lease applicable to the Licence or other authority for the licensed premises existing at the time of the execution hereof.

54. THAT upon the request of the Lessee and payment in advance by him to the Lessor as hereinafter provided and subject to any covenant condition or restriction in this clause contained the Lessor will grant to the Lessee leave and licence to use in common with the Lessor the area excepted out of this Lease by the Lessor for access from Wynyard Lane to the goods lift of the Lessor such area being shown marked "APPROACH" in the plan of level "J" in the said plan "D3" and in the Sectional Elevation thereof in the said plan "D1" and to use in common with the Lessor the area excepted out of this Lease by the Lessor for access to the goods lift of the Lessor such area being shown marked "APPROACH" in the plan of level "N" in the said plan "D3" and in the Sectional Elevation thereof in the said plan "D1" together with leave and licence to use the goods lift of the Lessor which is constructed and installed on or over the land delineated uncoloured and coloured as aforesaid in the said plans "D1", "D2" and "D3" if such goods lift is in the opinion of the Lessor in a condition fit for use at such times

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between the hours of six of the clock in the forenoon and five of the clock in the afternoon on Monday Tuesday Wednesday Thursday Friday and Saturday other than during such periods of time aggregating in all three hours during each day at any time or from time to time chosen by the Lessor in its absolute discretion notice of which shall be given by the Lessor in writing during which the Lessor shall be entitled to the exclusive use of such goods lift for which aforesaid leave and licence the Lessee will pay the sum of one thousand pounds (£1,000/-/-) at or before the commencement of each calendar year during its currency and if the said leave and licence shall continue for a time involving a part of a calendar year will pay at or before the commencement of such part such proportion of the sum of one thousand pounds (£1,000/-/-) as the part of the year bears to a calendar year provided that if at any other time the Lessor and the Lessee require the use of the lift simultaneously the Lessor shall have preference and that if the Lessee requires the use of the goods lift and the Lessor is prepared to make it available between the hours of five of the clock in the afternoon and midnight and midnight and six of the clock in the forenoon on Monday Tuesday Wednesday Thursday Friday and Saturday or at any time on Sunday the Lessee may use the goods lift during such time provided he shall have given to the Lessor fourteen hours notice of any such requirement on week days or twenty-four hours' notice of any such requirement on Sundays and the Lessee will in any such case pay to the Lessor upon demand additionally to the said payment at the rate of one thousand pounds (£1,000/-/-) the cost actually incurred by the Lessor in making the said goods lift so available provided further that upon the request of the Lessee the Lessor will extend the said goods lift as far up or down in the said building as the Lessee may require and the cost of doing so and of providing a lift service for the Lessor while preparation is being made for and during the construction and completion of such extension as certified by the Chief Civil Engineer of the Lessor or such other officer as may at any time or from time to time be deputed for the purpose will be paid by the Lessee to the Lessor upon demand in such amounts and at such times as the Lessor may require and upon completion of the work the Lessor will grant to the Lessee upon his request therefor leave and licence to use the said goods lift upon the terms and conditions in this clause contained but whether or not such leave and licence has been requested or granted the Lessee will from time to time pay to the Lessor any cost of the operation after such extension of the said goods lift which exceeds the cost of its operation before such extension upon receiving from the Lessor a statement in writing showing the amount of such additional cost PROVIDED FURTHER that the goods lift will at all times be controlled and operated only by an employee of the Lessor deputed for that purpose (hereinafter referred to as the goods lift attendant) THAT the Lessee will arrange his requirements in connection with the use of the goods lift so as to leave the services of the goods lift attendant as fully available to the Lessor as is reasonably practicable AND THAT the Lessee will not place nor cause to be placed on or in the goods

lift any thing or things of or aggregating a weight exceeding eleven thousand pounds gross or of a nature likely to cause damage to it PROVIDED FURTHER that the Lessee will upon demand pay to the Lessor one half of the cost as certified by the Chief Civil Engineer for the time being of the Lessor or such other officer as may at any time or from time to time be deputed by the Lessor for the purpose of repairing and maintaining any floor wall and ceiling of the area excepted out of this Lease by the Lessor for access to the goods lift of the Lessor as aforesaid and shown marked "APPROACH" in the plan of level "J" and level "N" in the said plan "D3" and in the Sectional Elevation thereof in the said plan "D1" and of any fittings or other things of any kind or nature appertaining thereto PROVIDED that if at the commencement of the 11th year of the term of this Lease the wage being paid to the goods lift attendant has increased above the wage being paid to such attendant at the commencement of the term namely EIGHT HUNDRED AND SIXTY FOUR POUNDS THIRTEEN SHILLINGS AND THREE PENCE (£864/13/3) the Lessor may increase the said annual sum of ONE THOUSAND POUNDS (£1,000/-/-) as the amount of any increase in such wage bears to the wage at the commencement of the said term AND THAT in case of the non-observance or non-performance by the Lessee of any covenant condition or restriction contained or implied in this Lease or in the Licence by this clause granted to the Lessee and on the part of the Lessee to be observed or performed the Lessor shall at any time hereafter be entitled to terminate this Licence without notice.

55. AS regards the land shown in plans "E", "F" and "G" and that part of Wynyard Lane demised hereunder the Lessor has occupied such land by virtue of the provisions of the City and Suburban Electric Railways Act 1915 as amended and the Government Railways Act 1912 as amended and will endeavour to secure a statutory legal title thereto. The Lessee shall accept such title (if any) as the Lessor has or is able to secure thereto.

56. EXCEPT as in this Lease expressly provided the grant or reservation to the Lessor of any easement right privilege liberty or power in relation to the whole or any part of the demised premises shall not affect the obligation of the Lessee to perform and observe the covenants conditions and restrictions of this Lease in relation to the whole or any part of the demised premises which is subject to such grant or reservation as aforesaid.

57. THAT the Lessee shall have no power to debar the Lessor or its nominee any officer or person authorized by the Lessor using as it he or they think fit and every part of Wynyard Railway Station and any passageway and approach thereto or appurtenances thereof .

58. ANY covenant by the Lessee that he shall not or shall not without consent do perform or carry out any act matters or thing shall be deemed to include a covenant by the Lessee that he shall not or shall not without consent cause or permit the doing performing carrying out or occurrence of such act matter or thing.

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59. (a) EVERY covenant condition and restriction expressed or implied in this Lease and on the part of the Lessee to be observed or performed shall except where herein otherwise expressly provided be observed or performed by the Lessee at his own expense.

(b) IF the Lessee neglects or fails to comply with any notice served on him by the Lessor requiring the performance or observance within the time specified therein of any covenant condition or restriction on his part to be performed or observed the Lessor may without prejudice to any other right or remedy in respect of such neglect or failure make the same good at the expense of the Lessee.

60. THAT except as herein provided the Lessee paying the rent hereby reserved and performing and observing every covenant on his part contained or implied shall and may peaceably possess and enjoy the demised premises for the term hereby granted without any interruption or disturbance from the Lessor or any other person lawfully claiming from or under it.

61. THAT the Lessee hereby covenants with the Lessor to perform and observe the provisions of the Agreement between the Lessor and the Lessee of even date herewith to secure in the sum of TWO HUNDRED AND FIFTY THOUSAND POUNDS (£250,000 0s. 0d.) performance and observance of the Building Covenants in this Lease contained and any breach of any of the provisions of the said Agreement on the Lessees part to be performed or observed shall be deemed to constitute a default by the Lessee in the fulfilment of a covenant condition or restriction under clause 52 of this Lease and shall entitle the Lessor to exercise all or any of the remedies conferred upon the Lessor thereby but nothing contained in this clause (namely clause 61 hereof) shall in any way restrict the remedies of the Lessor under the provisions of the said Agreement or otherwise.

62. THAT no approval or notice herein required to be given by or on behalf of the Lessor shall be effective for any purpose whatsoever unless it is in writing and any approval of the Lessor may at any time or from time to time be wholly or partly withdrawn PROVIDED THAT the withdrawal of any approval shall not be made arbitrarily but the Lessor will as far as in its opinion its or public convenience or requirements may permit will refrain from causing unreasonable inconvenience to or interference with the Lessee or his sub-lessee AND PROVIDED ALSO that approval of a sub-letting will in no case be withdrawn unless the Lessee having been informed in writing of any objection thereto and having had such time for overcoming such objection as is fixed by the Lessor (a request for reasonable extension of which will be granted) has failed or refused to do so.

63. THAT any demand or notice to be given by the Lessor to the Lessee may be given in writing and signed by the Lessor or his Solicitor or the Lessor's Chief Property Officer or such other officer or person as may from time to time be deputed by the Lessor for the purpose and may be left at the demised premises or sent by ordinary post addressed to the Lessee thereat or addressed to the Lessee at his last place of address known to the Lessor.

64. THAT anything to be done or omitted by the Lessor shall be deemed to be done or omitted by it if done or omitted by its Solicitor or the Lessor's Chief Property Officer or an officer or person deputed by it for the purpose.

65. THAT every covenant condition and restriction expressed or implied in this Lease and on the part of the Lessee to be observed or performed shall where there is more than one Lessee bind the Lessees jointly and each of them severally.

SCHEDULE ONE

1. REMOVE all existing Railway Occupations (including all fixtures fittings equipment and things associated therewith) on the Upper Concourse Level of the demised premises and re-locate the same (except the Rifle Range and the Chief Electrical Engineer's Refrigeration Workshop hereinafter referred to) in the Basement level of the demised premises in the positions shown on the said plan of Messrs Peddle, Thorp & Walker, Architects, and marked W.D.H. 1/1.

2. RE-LOCATE the Chief Electrical Engineer's Refrigeration Workshop (including all fixtures fittings equipment and things associated therewith) in such location as the Lessor shall in writing direct.

3. TRANSFER all Railway Records from the said Upper Concourse Level to such location in the said Basement Level as the Lessor shall direct.

4. PROVIDE supply and maintain during the term of the Lease air conditioning to the Record Room and Model Room (two (2) of the Railway Occupations above referred to) and mechanical ventilation to all other Railway Occupations re-located as aforesaid in the said Basement Level PROVIDED that the Lessor shall provide supply and maintain to the said Railway Occupations all water and electricity other than water and electricity required for the said air conditioning and mechanical ventilation thereof.

5. PROVIDE storeage space for the Wynyard Pharmacy in place of the storeroom leased by that Pharmacy from the Lessor on the Hunter Street Level of the demised premises which storeroom is required by the Lessor and the Lessee for access to and from the Lessor's Goods Lift.

6. PROVIDE a lavatory for railway employees in the position indicated on the said plan W.D.H. 1/1 and shall connect the same to the Lessee's sewerage ejector and maintain such connection during the term of the Lease.

7. CONSTRUCT a brick terra cotta or concrete wall from floor level to ceiling to separate the demised premises including any rights of way thereover from all Railway Occupations in the said Basement Level.

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8. WITHOUT limiting any other obligation of the Lessee under this Lease make such alterations to the electrical gas water and other installations of the Lessor upon the demised premises as the Lessor shall require or should the Lessor so require remove the said installations from the demised premises and re-locate such installations where the Lessor shall direct PROVIDED that the Lessor shall make such alterations to removals and relocations of the telephone cables high voltage cable and such other installations upon the demised premises as it shall specify at the expense of the Lessee which shall be recoverable from the Lessee as a debt or liquidated demand.

SCHEDULE TWO

1. THE expression "the Lessee" where the context so admits shall include the Lessee's contractors agents and servants.

2. THE expression "the Engineer" shall mean the Lessor's Chief Civil Engineer or his representative.

3. IN the interpretation of these Conditions or in the event of any variance between these conditions and the conditions and terms of this Lease the decision of the Lessor shall be final and conclusive thereon.

4. THE Engineer may inspect all materials during fabrication and may make tests of such materials or the Engineer at his option may require the Lessee to produce any evidence of tests which he may require and all costs incurred in connection with such inspection or tests shall be borne by the Lessee.

5. THE Engineer may reject any materials not conforming to specifications and the Lessee shall remove any rejected materials from railway property.

6. THE workmanship throughout shall be in accordance with the best practice of the respective trades to the approval of the Engineer who may at his discretion order the removal or alteration of any unsatisfactory work.

7. IN every instance where work is to be carried out adjacent to railway tracks and it is considered necessary or desirable by the Engineer that such work shall be carried out by the Lessor the Lessor shall at the cost of the Lessee:

(i) Furnish all materials and equipment and perform all work which may be necessary in connection therewith excepting such work as the Lessee is permitted to carry out or assist in carrying out at the discretion of the Engineer.

(ii) Provide supervision staff flagmen and workmen as considered necessary for the safe carrying out of the work and the Engineer shall be the sole judge of the number and classification of the staff provided.

8. IN the event of the work by the Lessee not being carried out to the satisfaction of the Engineer he may where the safety of the railways or the public is liable to be affected thereby assume control and perform or cause to be performed any work he considers necessary at the cost of the Lessee.

9. THE Lessee with the approval of the Engineer may carry out alterations or connections to railway sewerage drainage gas and water supplies rendered necessary by the work.

10. THE Lessee shall at all times take all necessary precautions and arrange and perform its work in such a manner as will protect the safety and continuity of and not impede or interfere with railway operations and facilities and for such purpose the Lessee shall confer and co-operate with the Engineer on all matters connected with the work.

11. THE Lessee shall comply with the Lessor's safety requirements governing work to be performed under over or adjacent to all electric mains cables wires and associated equipment.

12. ALL persons engaged by the Lessee shall carry out immediately any instruction issued by the Engineer and in the event of any such instruction not being complied with to the satisfaction of the Engineer he shall have power to stop or require the Lessee to stop immediately all work on railway property where the safety of the railways or the public is liable to be affected thereby pending full compliance with such instruction.

13. THE Engineer shall have power to order the removal from railway property of any person who infringes any safety regulation or is considered unsuitable to work in the vicinity of railway tracks electric mains cables wires and associated equipment.

14. BEFORE commencing the construction of the buildings the Lessee (without limiting his obligations and responsibilities under clauses 36, 37 and 38 of this Lease) shall insure against any damage loss or injury which may occur to any person or property whatsoever by or arising out of the construction of the building or the carrying out of any work in connection therewith in the sum of TWO HUNDRED AND FIFTY THOUSAND POUNDS (£250,000 0s. 0d.). Such insurance shall be effected in terms approved by the Lessor and the Lessee shall whenever required produce to the Engineer the policy or policies of insurance and the receipts for payment of the current premium.

15. THE Lessee shall take upon itself the whole risk of executing the work in accordance with the approved plans specifications calculations and instructions.

16. THE approval of the Engineer when given shall not be considered as a release of the Lessee from responsibility or liability for any damage which the Lessor may suffer, or for which it may be held liable as a result of acts of the Lessee or of its employees.

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17. THE providing of employees of the Lessor and such other precautions as may be taken by the Lessor shall not relieve the Lessee from any such responsibility or liability for damage as aforesaid.

MEMORANDUM OF ENCUMBRANCES, &C., REFERRED TO.

Dated at Sydney, this 19th day of December, 1961.

The Common Seal of THE COMMISSIONER FOR RAILWAYS hath been hereunto duly affixed in the presence of

W. K. KING,
Asst Secretary for Railways.

(L.S.)

Lessor.

(L.S)
CORRECT
S. BURKE,
Solicitor for Railways

WYNYARD HOLDINGS LIMITED the within-named Lessee doth hereby accept this Lease as tenant, subject to the conditions, restrictions and covenants above set forth, and certifies it to be correct for the purposes of the Real Property Act, 1900.

The Common Seal of WYNYARD HOLDINGS LIMITED was hereunto affixed by authority of the Board of Directors previously given in the presence of COLIN ANDERSON GRAY *and* ERIC SEIDEL CLEMENTSON two of the Directors thereof and STEWART JEFF MOORE the Secretary thereof.

(L.S.)
COLIN A. GRAY.
E. S. CLEMENTSON.
STEWART J. MOORE.

Lessee.

RECEIVED into the Registration of Deeds Office at Sydney the Fifth day of January One thousand nine hundred and Sixty-two at Twenty eight minutes past Eleven o'clock in the forenoon from Jeffrey James Fitzgerald of 19 York Street Sydney Clerk to Sydney Burke Solicitor for Railways a true copy of the within written Deed of Lease verified by the said Jeffrey James Fitzgerald and Numbered 438 Book 2595.

— QUIGLEY (L.S.)
Deputy Registrar.

NOTE. Original Sealed Receipt is endorsed on the original of this instrument which is bound at L.T.O. under H962793.

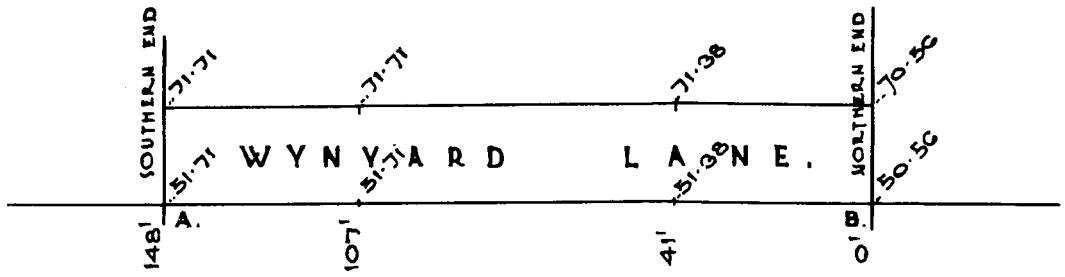
"A"

SITE PLAN

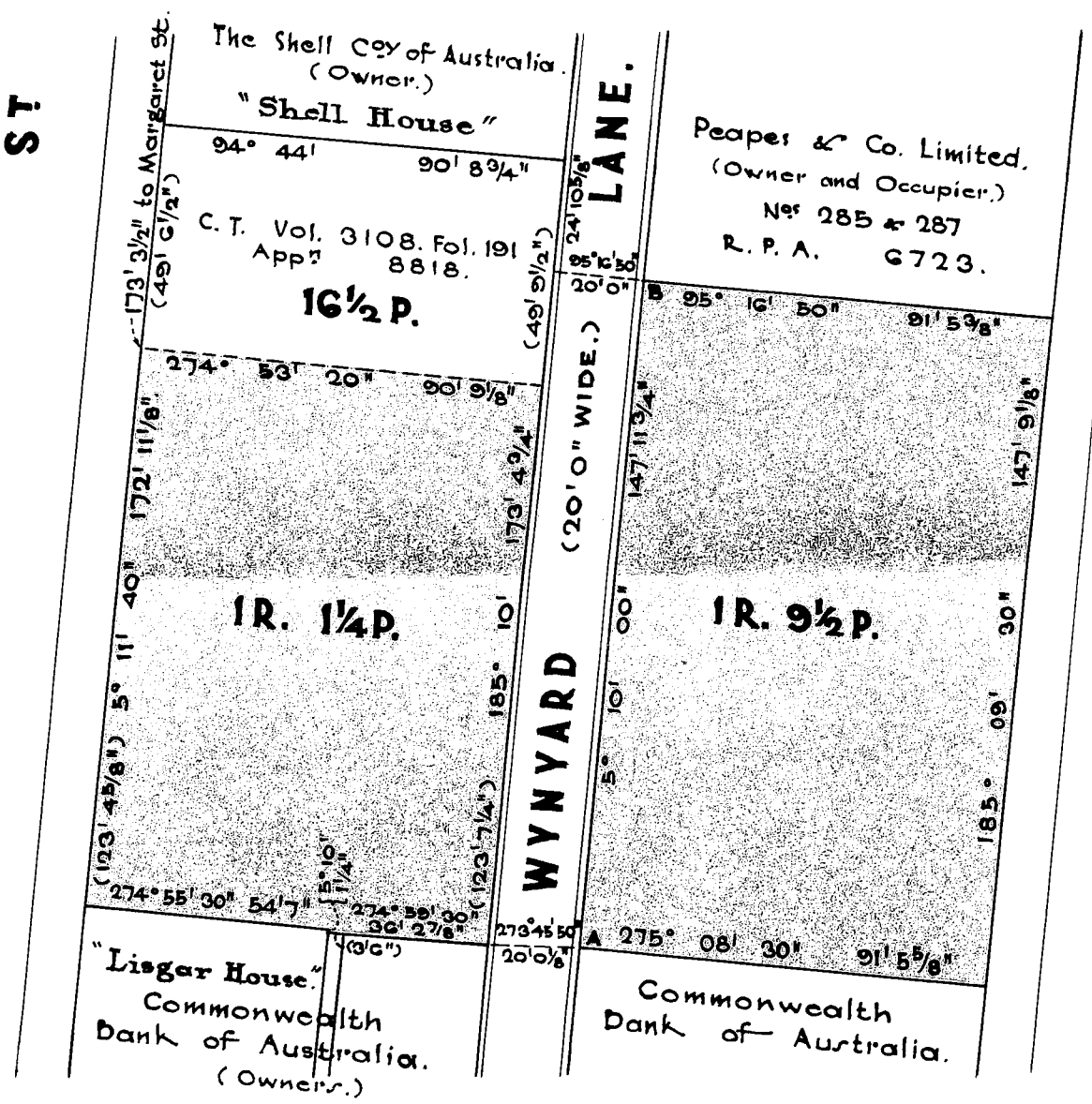
Parish of St Phillip. — County of Cumberland.

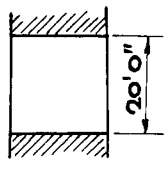
CITY OF SYDNEY.

Scale. 40 Feet to an Inch.



LONGITUDINAL SECTION ALONG ℄ OF WYNYARD LANE.





TYPICAL CROSS SECTION OF WYNYARD LANE.

Signed. ....Stewart J. Moore....

Witness. ....Ruth Tovey....

For and on behalf of the Commissioner for Railways

W. K. King
Asst. Secretary.

L. Muggeridge
Witness.

This is the annexure marked "A" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.

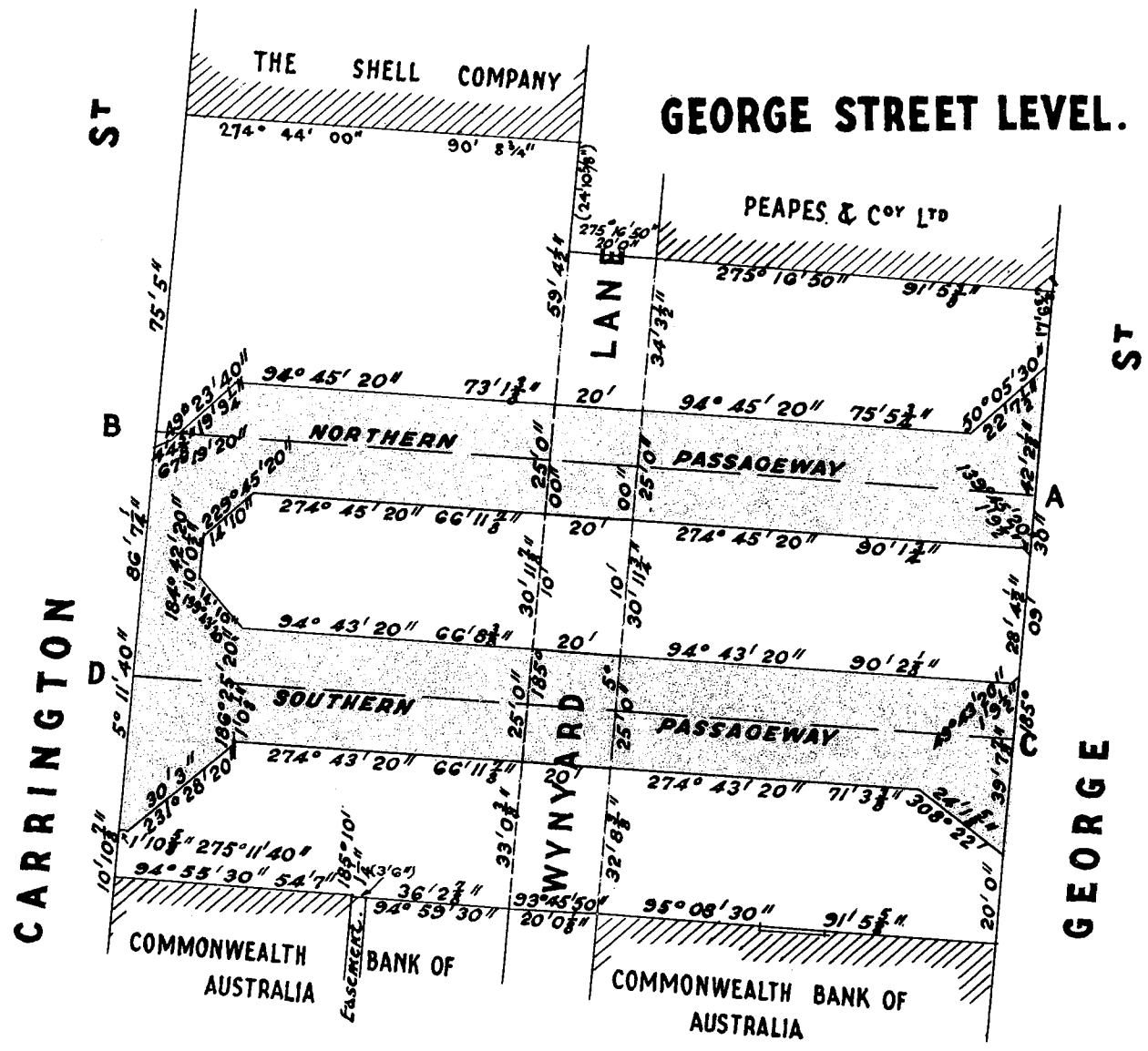
Dated. 19th December 1961

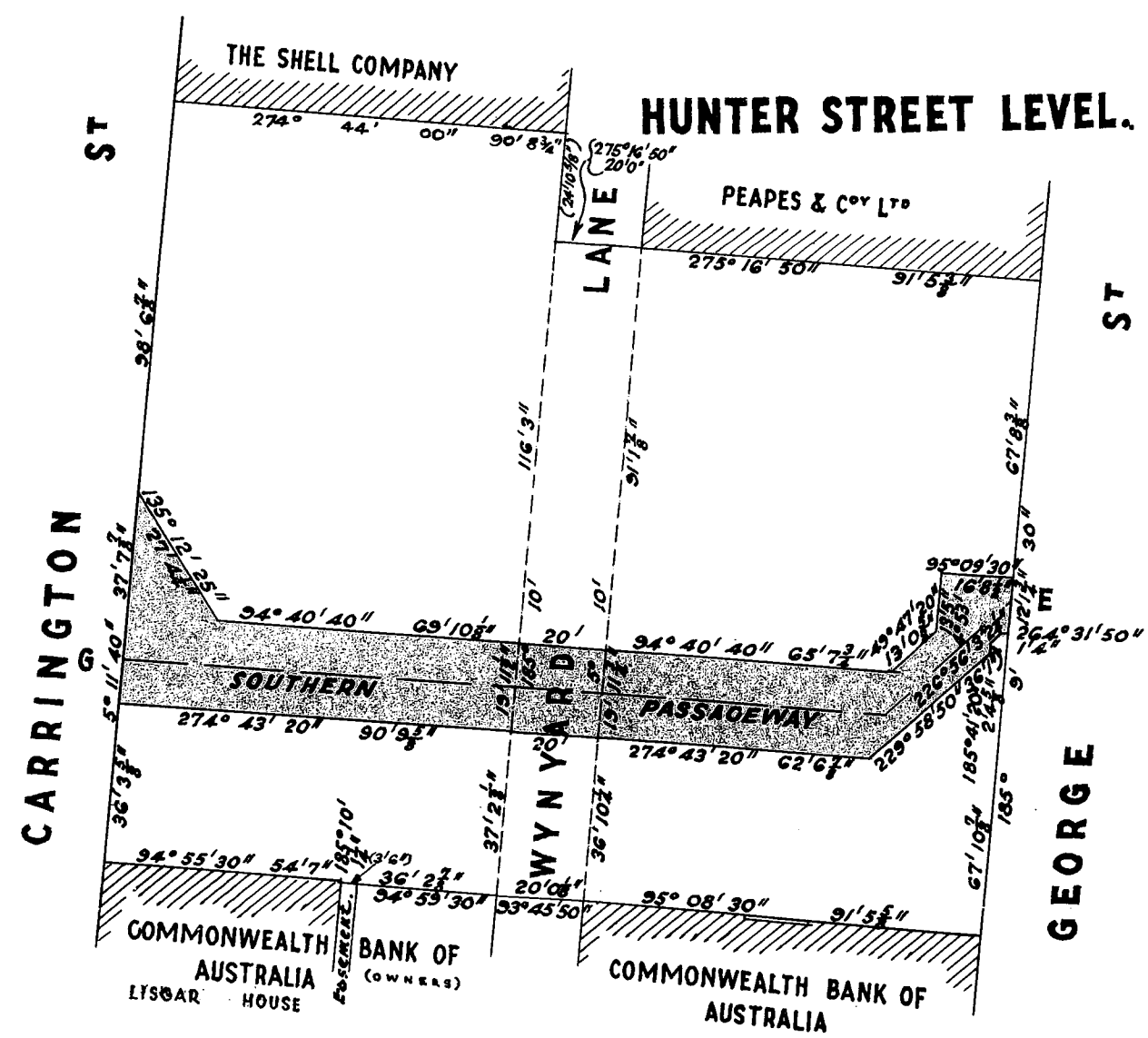
"B"

PLAN

Showing by blue colour passageways excepted out of Lease from Commissioner for Railways to Wynyard Holdings Limited.

Scale 40 feet = 1inch.





SIGNED _ Stewart J. Moore _

Witness. _ Ruth Towey _ _ _ _ _

For and on behalf of the Commissioner for Railways

_ _ W.K. King _ _ _ _ _

Asst. Secretary.

_ _ _ L. Muggeridge _ _ _

Witness.

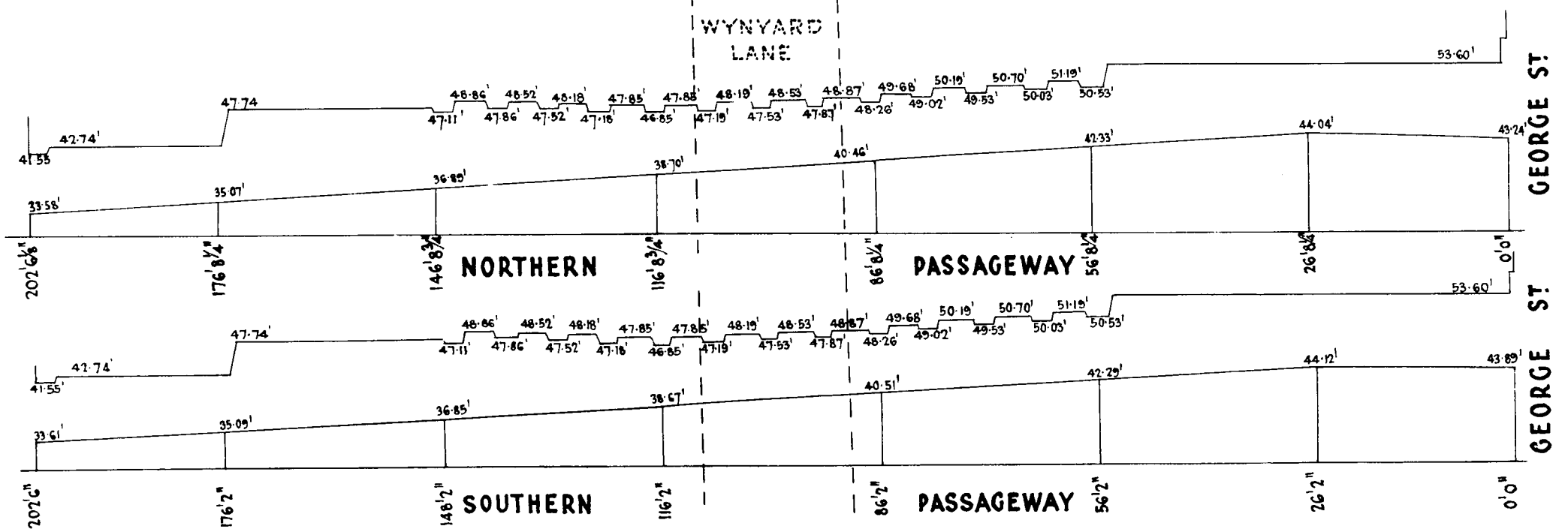
This is the annexure marked "B" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.

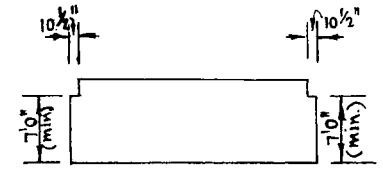
Dated the _ 19th December 1961 _ _ _ _ _

Elevations of passageways excepted out of Lease from the Commissioner for Railways to Wynyard Holdings Limited.

Scale: 20 feet to an Inch.

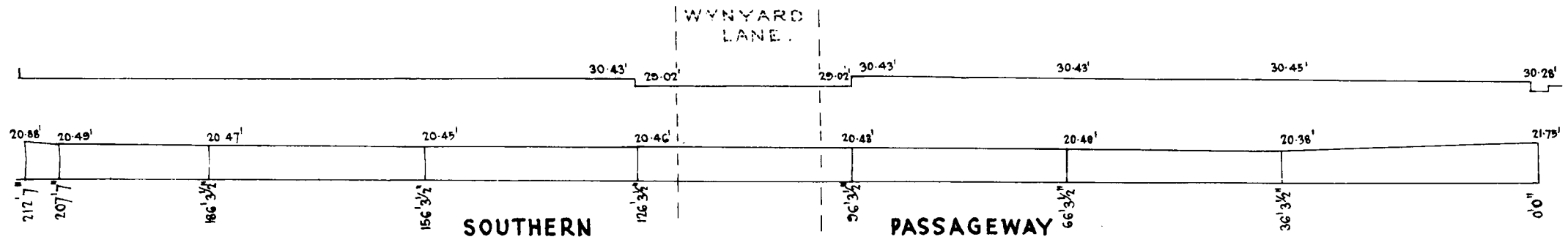
GEORGE ST. LEVEL





TYPICAL CROSS SECTION.

HUNTER ST. LEVEL



"C"

This is the annexure marked "C" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.

Dated. 19th December 1961

For and on behalf of the Commissioner for Railways

W. K. King
Asst. Secretary.

L. Muggeridge
Witness.

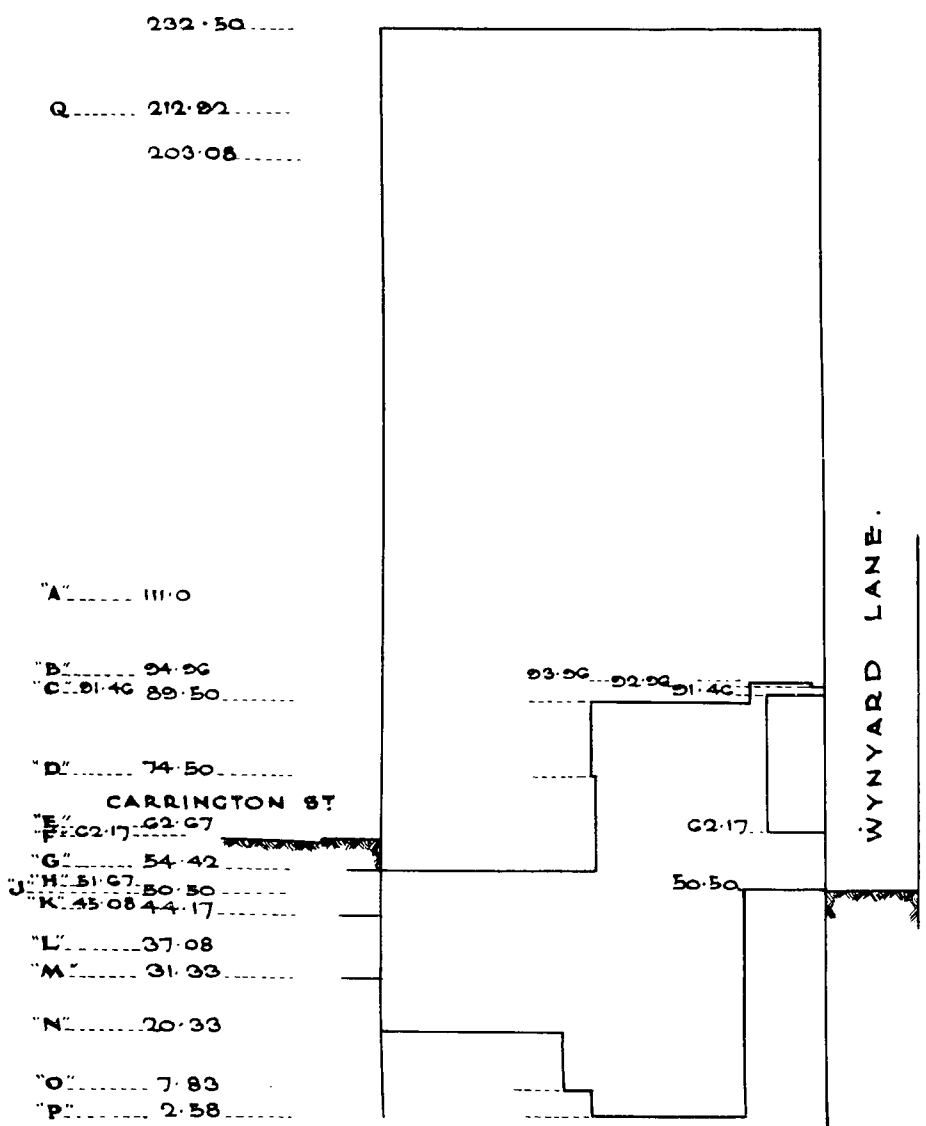
Signed. Stewart J. Moore

Witness. Ruth Towey

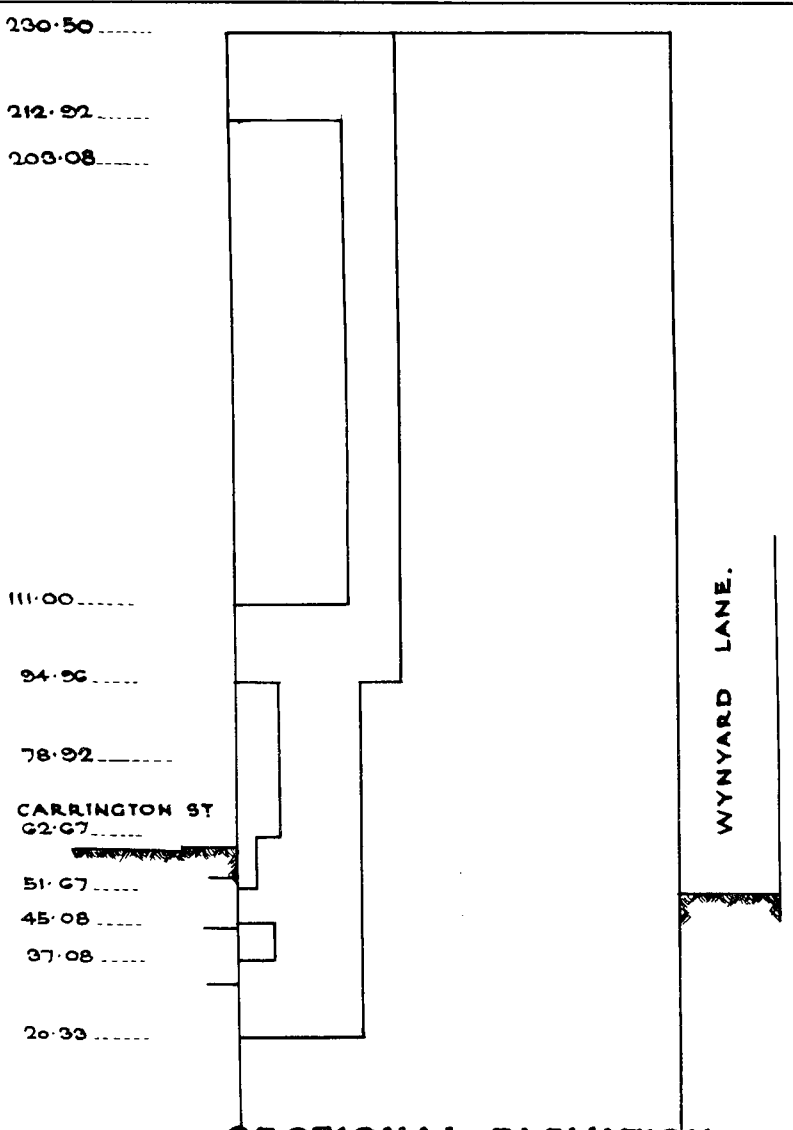
SECTIONAL ELEVATIONS SHOWING LIFT WELLS, APPROACHES AND AIR DUCTS EXCEPTED OUT OF LEASE FROM THE COMMISSIONER FOR RAILWAYS TO WYNYARD HOLDINGS LIMITED.

SCALE. 40 FEET TO AN INCH.

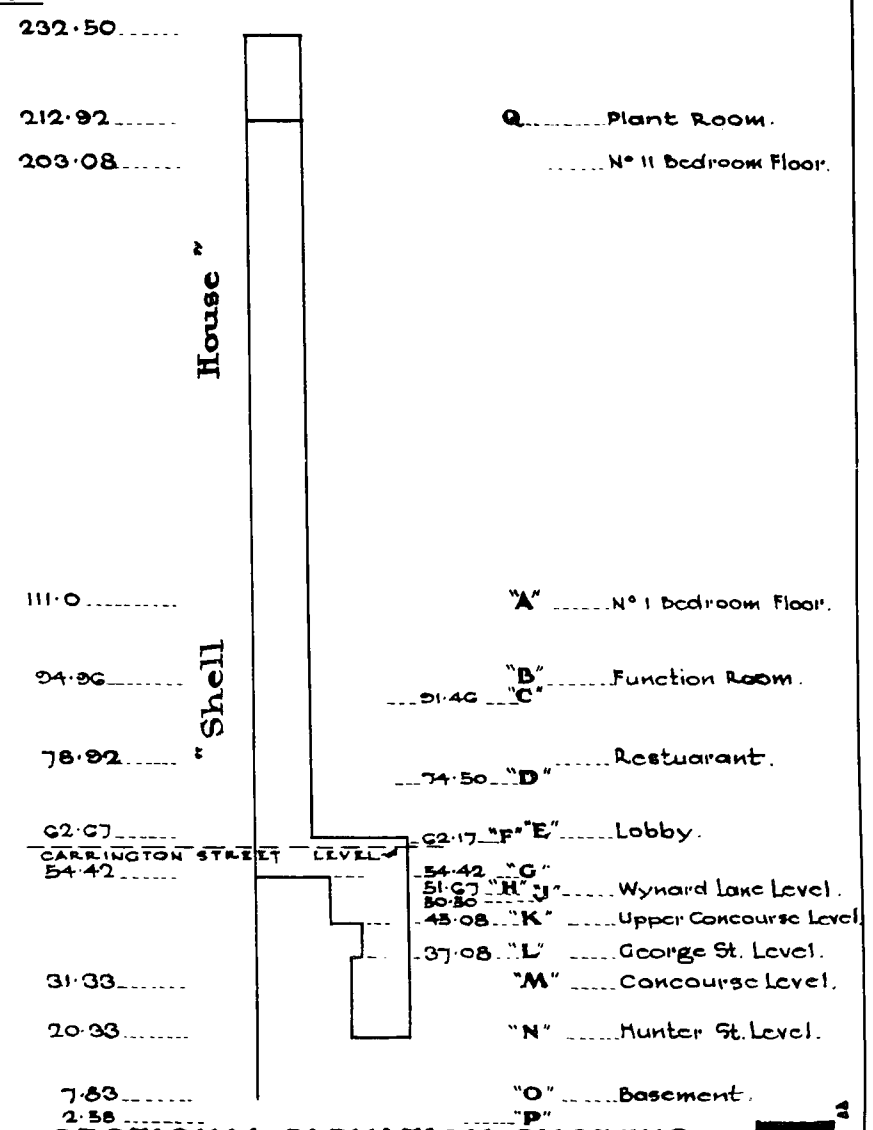
SEE PLANS "D2" AND "D3" FOR LOCATIONS SHOWN BY LETTERS "A" TO "H" AND "J" TO "Q"



SECTIONAL ELEVATION SHOWING LIFT WELL, APPROACHES AND AIR DUCT, LOOKING NORTH.



SECTIONAL ELEVATION SHOWING AIR DUCTS AND LOOKING NORTH.



SECTIONAL ELEVATION SHOWING AIR DUCTS, LOOKING EAST FROM CARRINGTON STREET.

D1

This is the annexure marked "D1" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.

Dated. 19th December 1961

For and on behalf of the Commissioner for Railways.

W. K. King
Asst. Secretary.

L. Muggeridge
Witness.

Signed. Stewart J. Moore

Witness. Ruth Towey

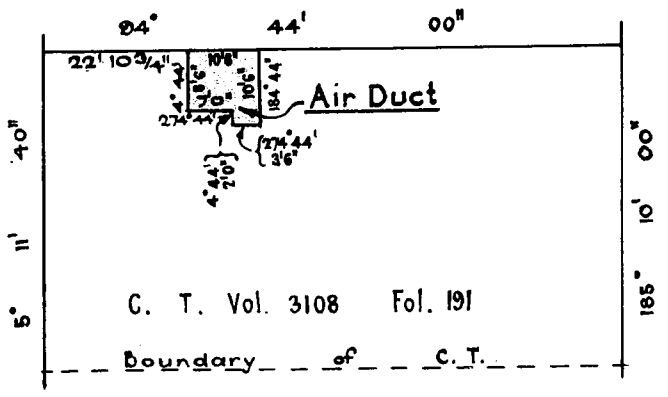
"D_2"

PLAN

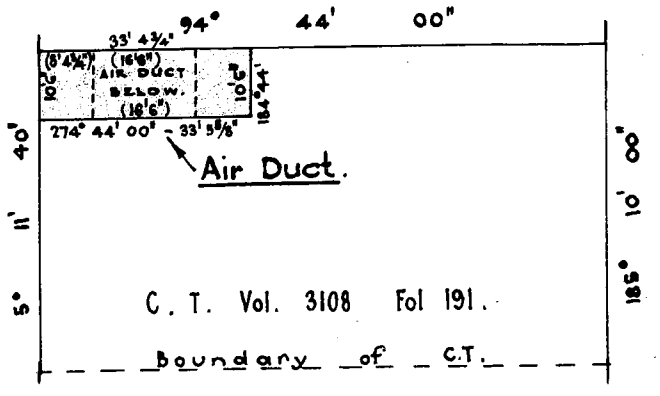
Showing by blue colour Lift Wells, Approaches and Air Ducts excepted out of Lease from the Commissioner for Railways to Wynyard Holdings Limited.

Scale : 30 feet to an inch.

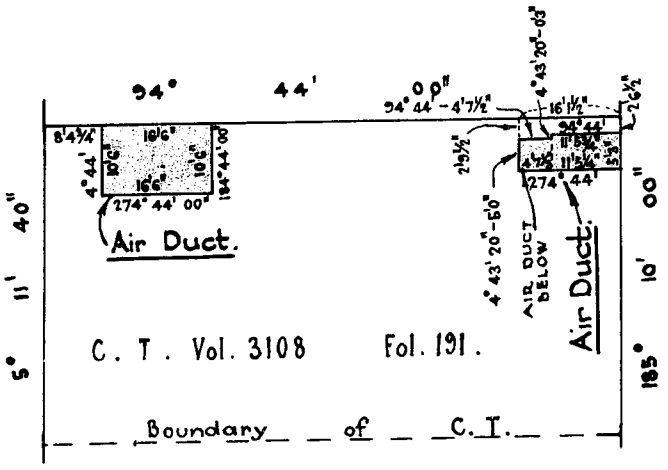
See plan D_1 for Sectional Elevations of Exceptions.



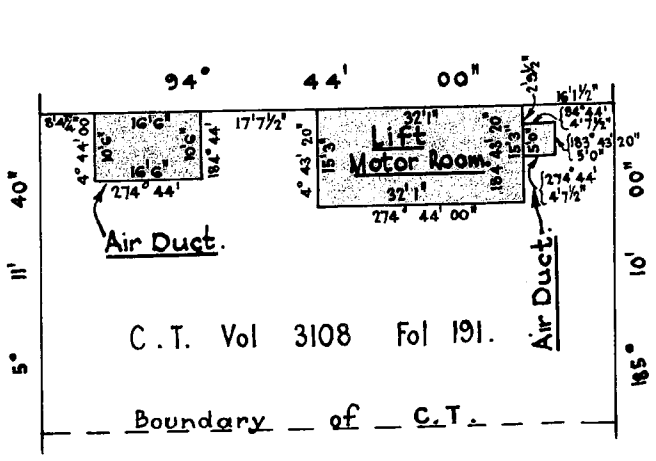
LEVEL 'A' 111·00' to 212·92'



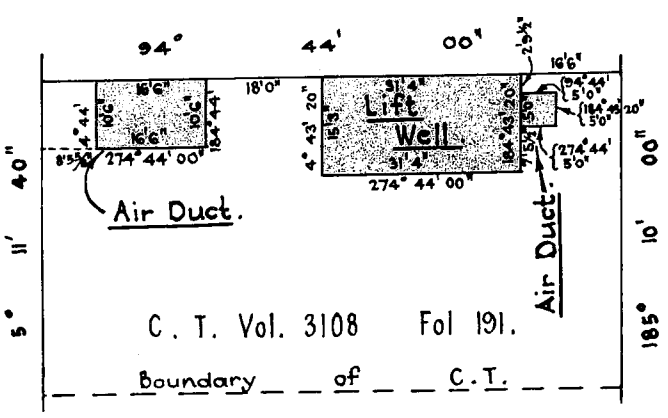
LEVEL 'B' 94·96' to 111·00'



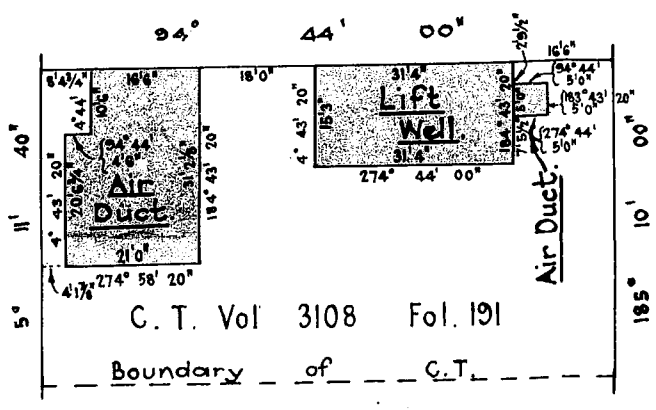
LEVEL 'C' 91·46' to 93·96'



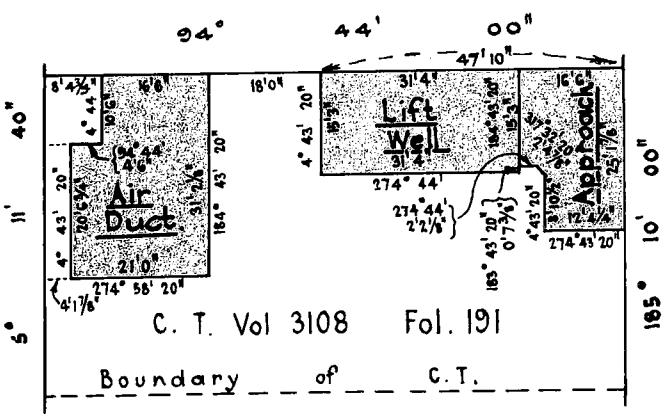
LEVEL 'D' 74·50' to 89·50'



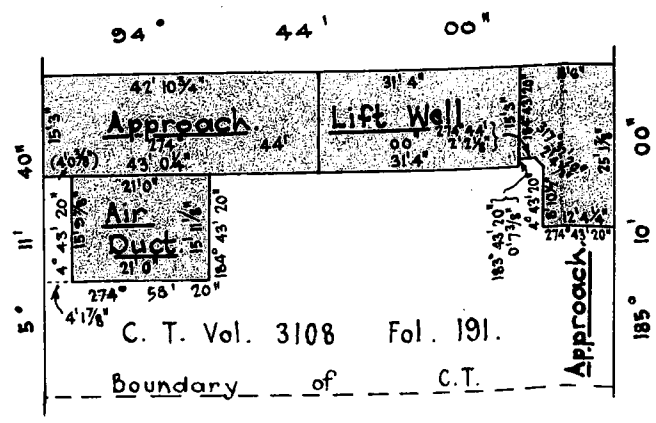
LEVEL 'E' 62·67' to 74·50'



LEVEL 'F' 62·17' to 62·67'



LEVEL 'G' 54·42' to 62·17'



LEVEL 'H' 51·67' to 54·42'

Signed. Stewart J. Moore

Witness. Ruth Towey

For and on behalf of the Commissioner for Railways

W. K. King
Asst. Secretary.

L. Muggeridge
Witness.

This is the annexure marked "D_2" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.

Dated. 19th December 1961

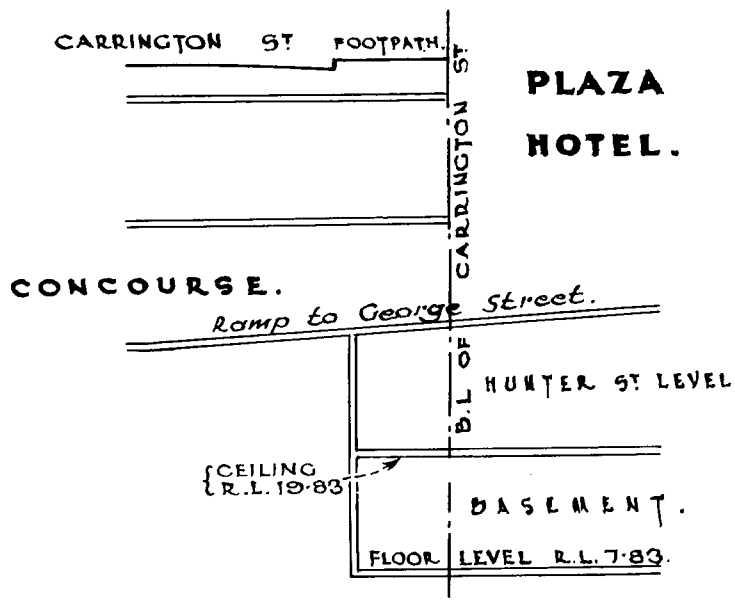
BASEMENT LEVEL

— PLAN —

"E"

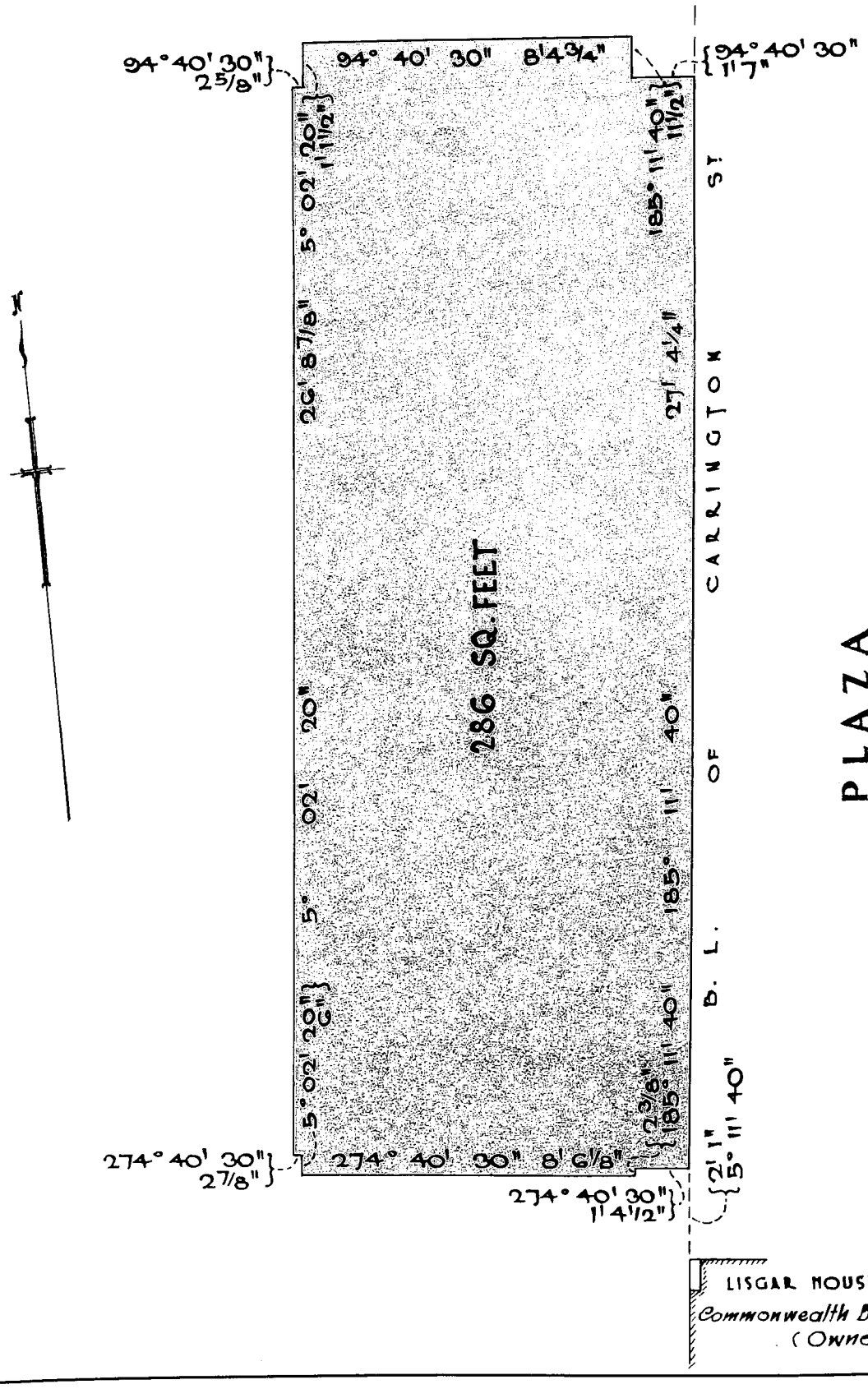
showing in red, stratum of land leased from the Commissioner for Railways to Wynyard Holdings Limited.

Scale. 4 Feet to an Inch.



SECTIONAL ELEVATION ON A LINE PARALLEL TO AND 2 FEET FROM THE SOUTHERN BOUNDARY.

Scale. 20 Feet to an Inch.



Signed. Stewart J. Moore

Witness. Ruth Towsey

For and on behalf of The Commissioner for Railways.

W. K. King
Asst. Secretary.

L. Muggeridge
Witness.

This is the annexure marked "E" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.

Dated. 19th December 1961

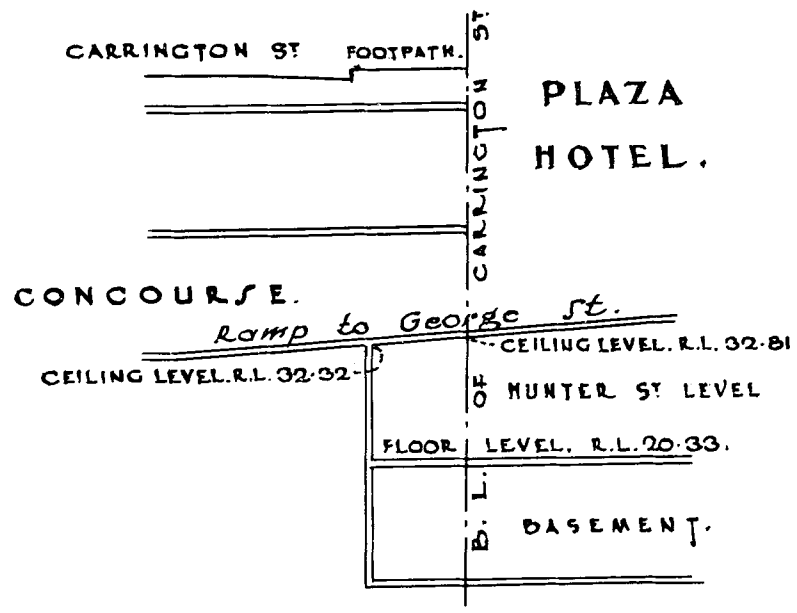
HUNTER STREET LEVEL

—PLAN—

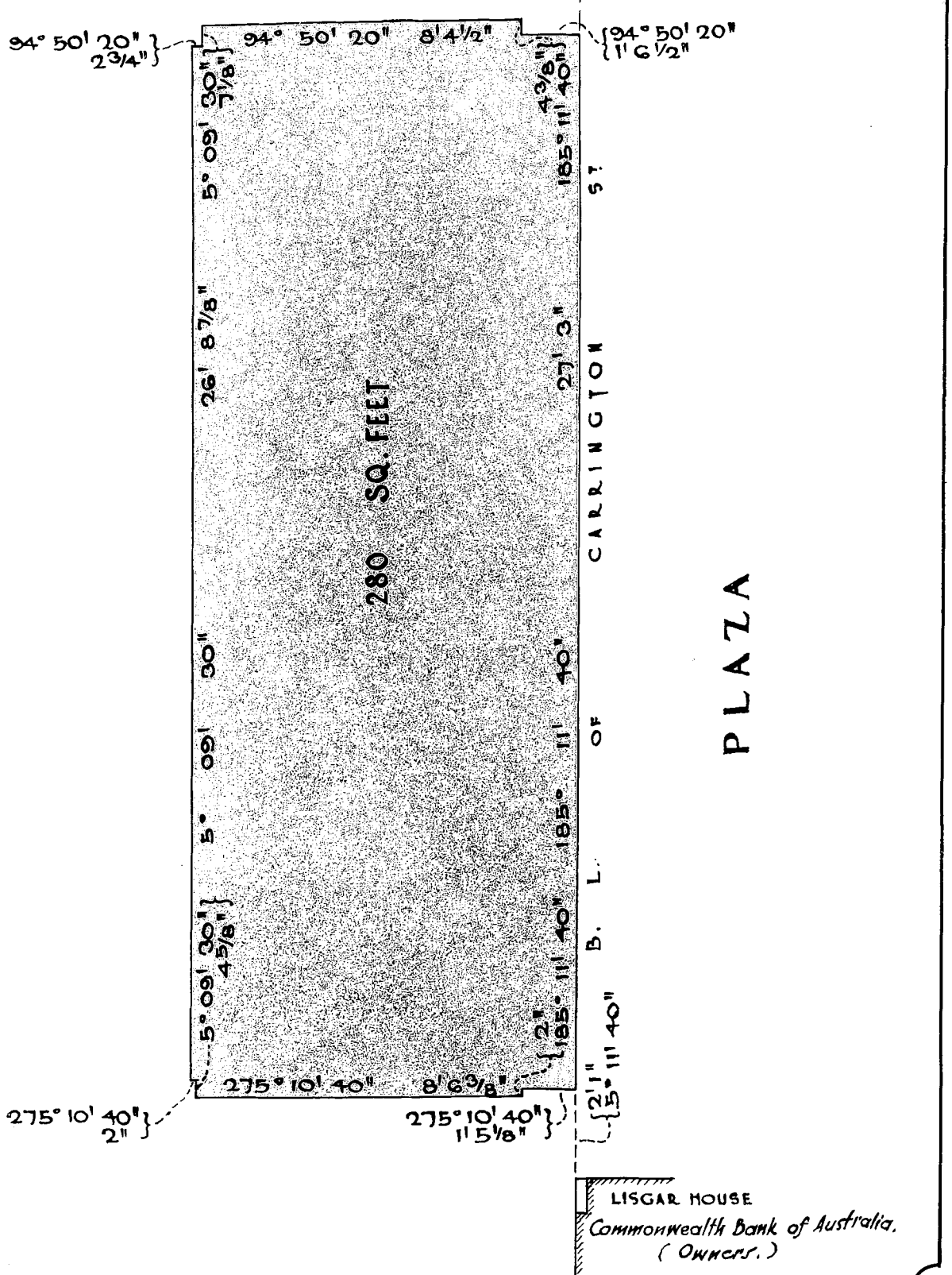
"F"

showing in red, stratum of land leased from the Commissioner for Railways to Wynyard Holdings Limited.

Scale. 4 Feet to an Inch.



SECTIONAL ELEVATION ON A LINE PARALLEL TO AND 2 FEET FROM THE SOUTHERN BOUNDARY.
Scale. 20 Feet to an Inch.



Signed. Steward J. Moore

Witness. Ruth Towsey

For and on behalf of The Commissioner for Railways.

W. K. King
Asst. Secretary.

L. Muggeridge
Witness.

This is the annexure marked "F" referred to in the attached Memorandum of Lease made betcen the Commissioner for Railways and Wynyard Holdings Limited.

Dated. 19th December 1961

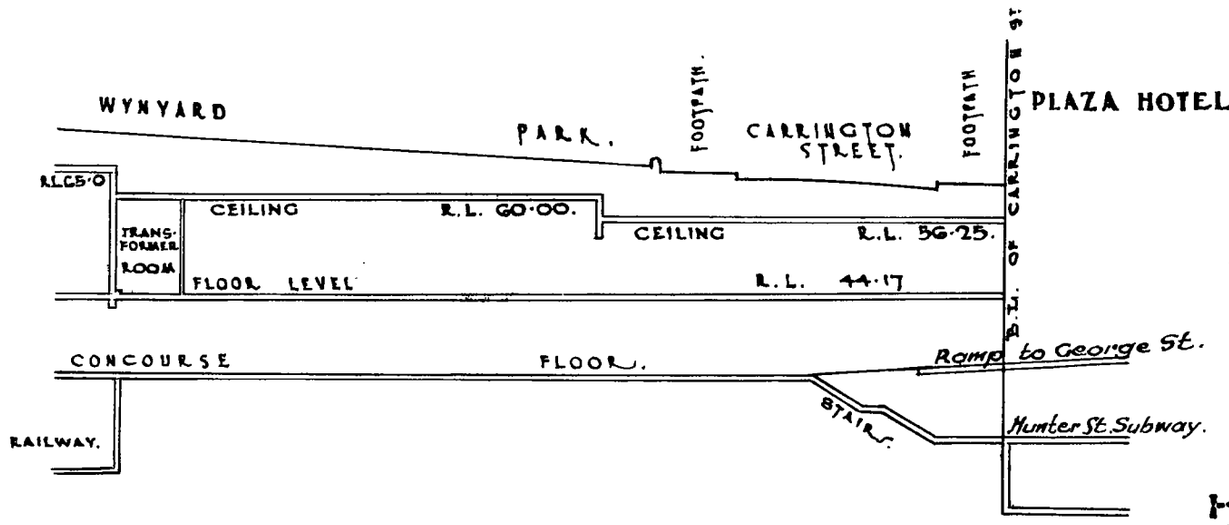
UPPER CONCOURSE LEVEL

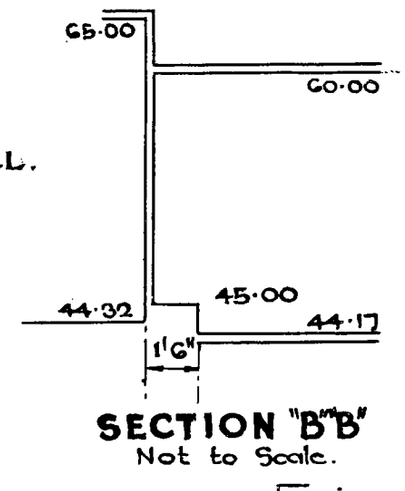
"G"

PLAN

showing in red, stratum of land leased from the Commissioner for Railways to Wynyard Holdings Limited.

Scale. 20 Feet to an Inch.

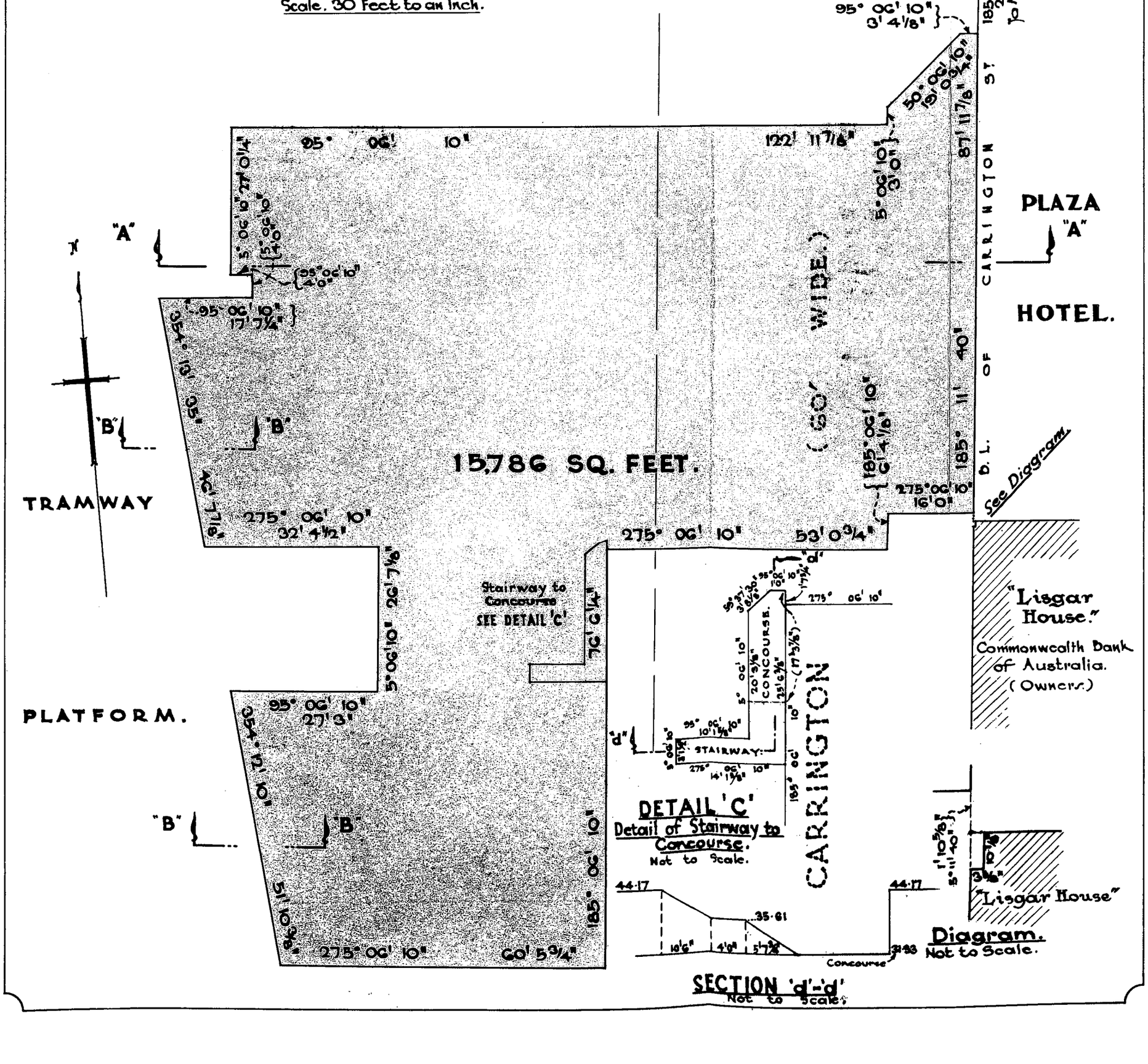




SECTION "B"B"
Not to Scale.

SECTION "A" "A"

Scale. 30 Feet to an Inch.



Signed. Stewart J. Moore

Witness. Ruth Towey

For and on behalf of the Commissioner for Railways.

W. K. King
Asst. Secretary.

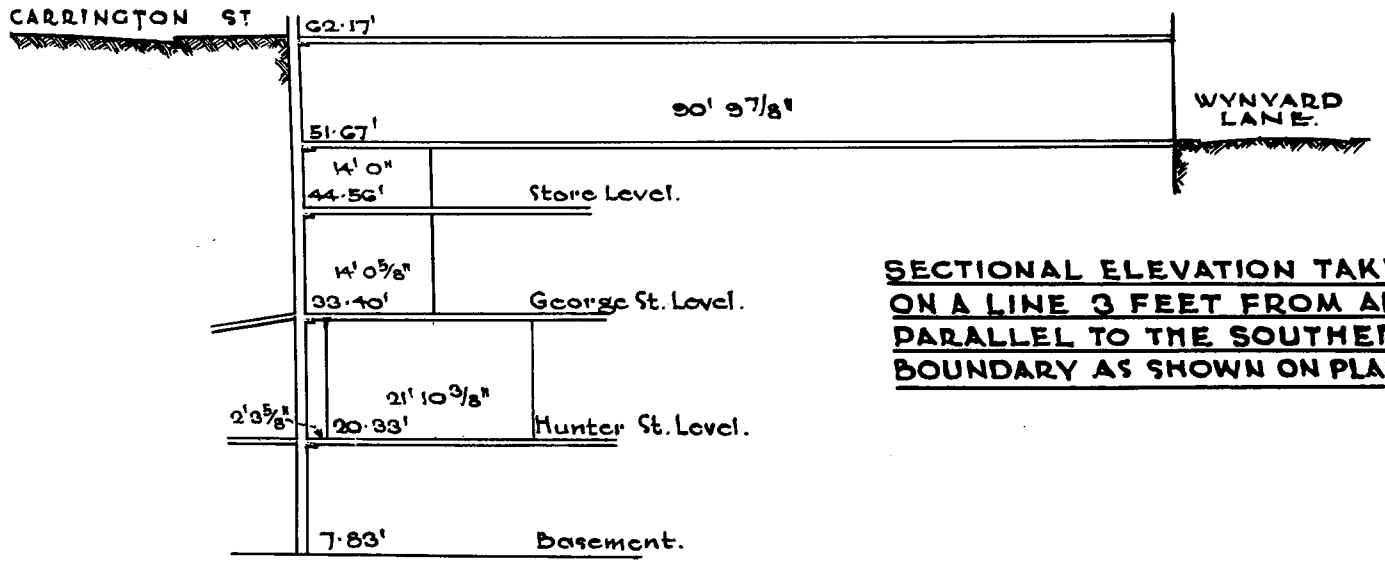
L. Muggeridge
Witness.

This is the annexure marked "G" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.

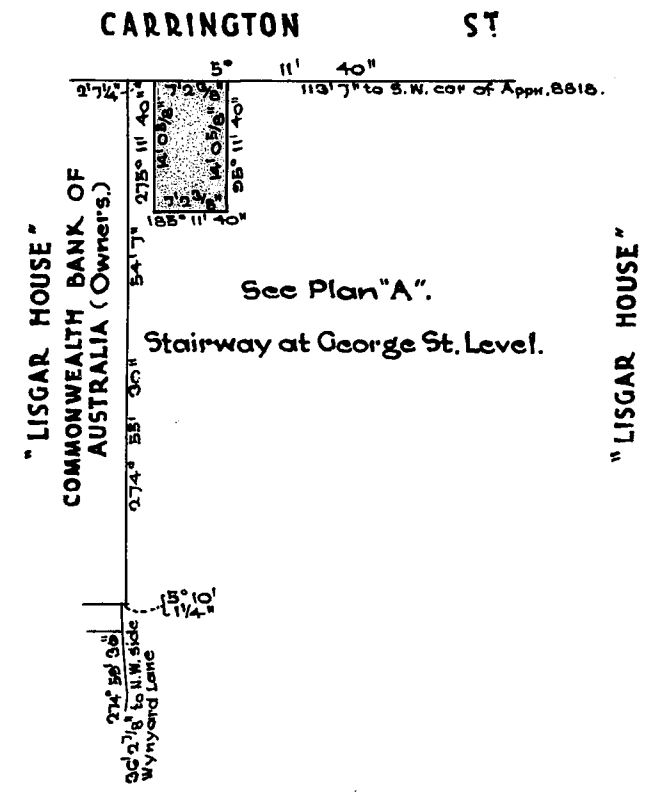
Dated. 19th December 1961

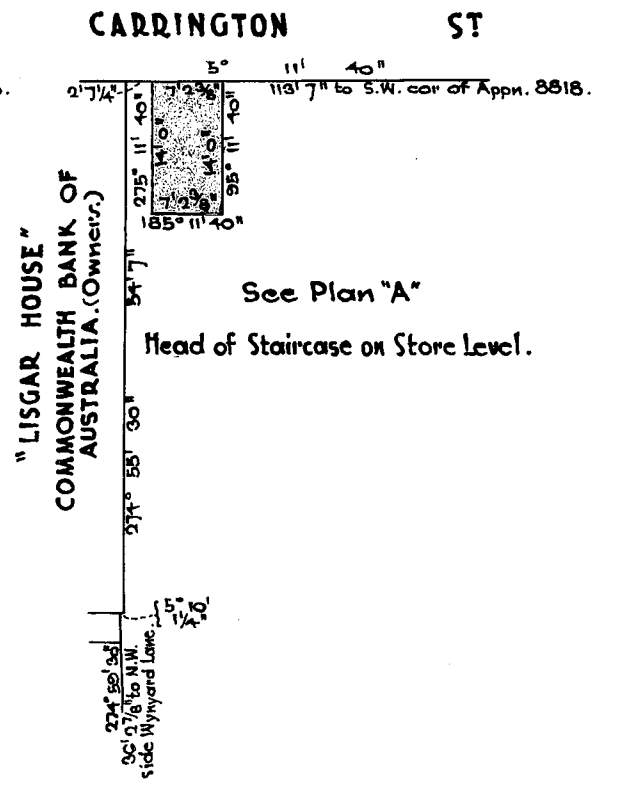
Plan showing by green colour Fire Escape Stairways and passageways over which the Commissioner for Railways reserves a Right of Way.

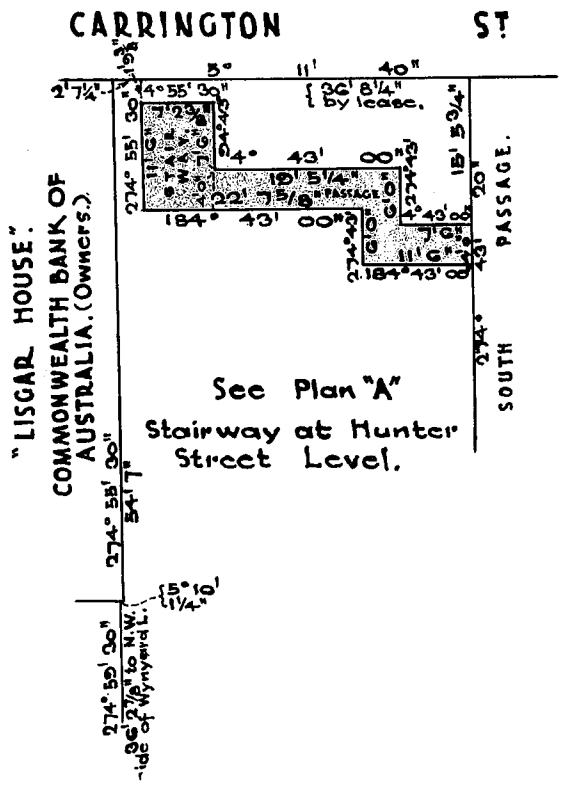
Scale: 20 Feet to an Inch.

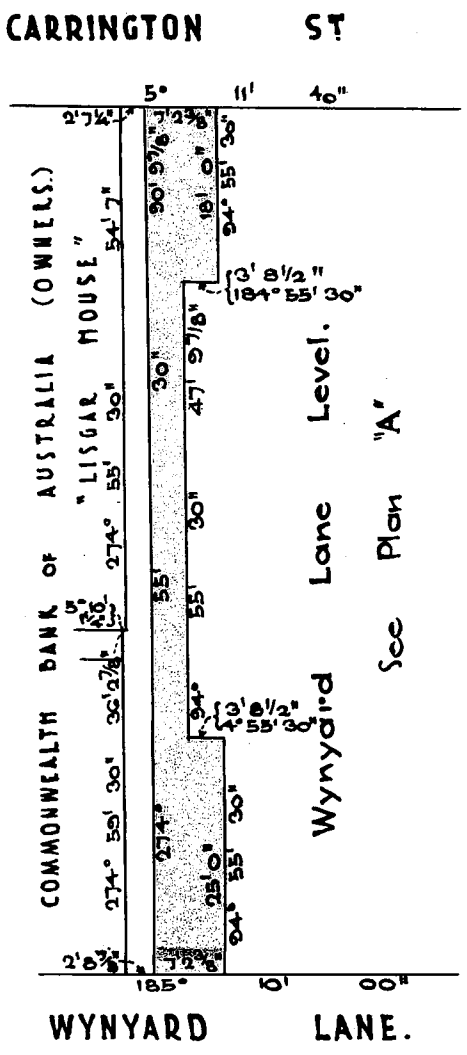


SECTIONAL ELEVATION TAKEN ON A LINE 3 FEET FROM AND PARALLEL TO THE SOUTHERN BOUNDARY AS SHOWN ON PLAN "A".









H

This is the annexure marked "H" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.

Dated. 19th December 1961

For and on behalf of the Commissioner for Railways.

W. K. King
Asst. Secretary.

L. Muggeridge
Witness.

Signed. Stewart J. Moore

Witness. Ruth Towey

PLAN

"J"

showing basement area of Hotel and Shopping Block (a) by blue colour areas excepted from lease granted by the Commissioner for Railways to Wynyard Holdings Limited and (b) by green colour passageways over which the Commissioner for Railways reserves a Right of Way.

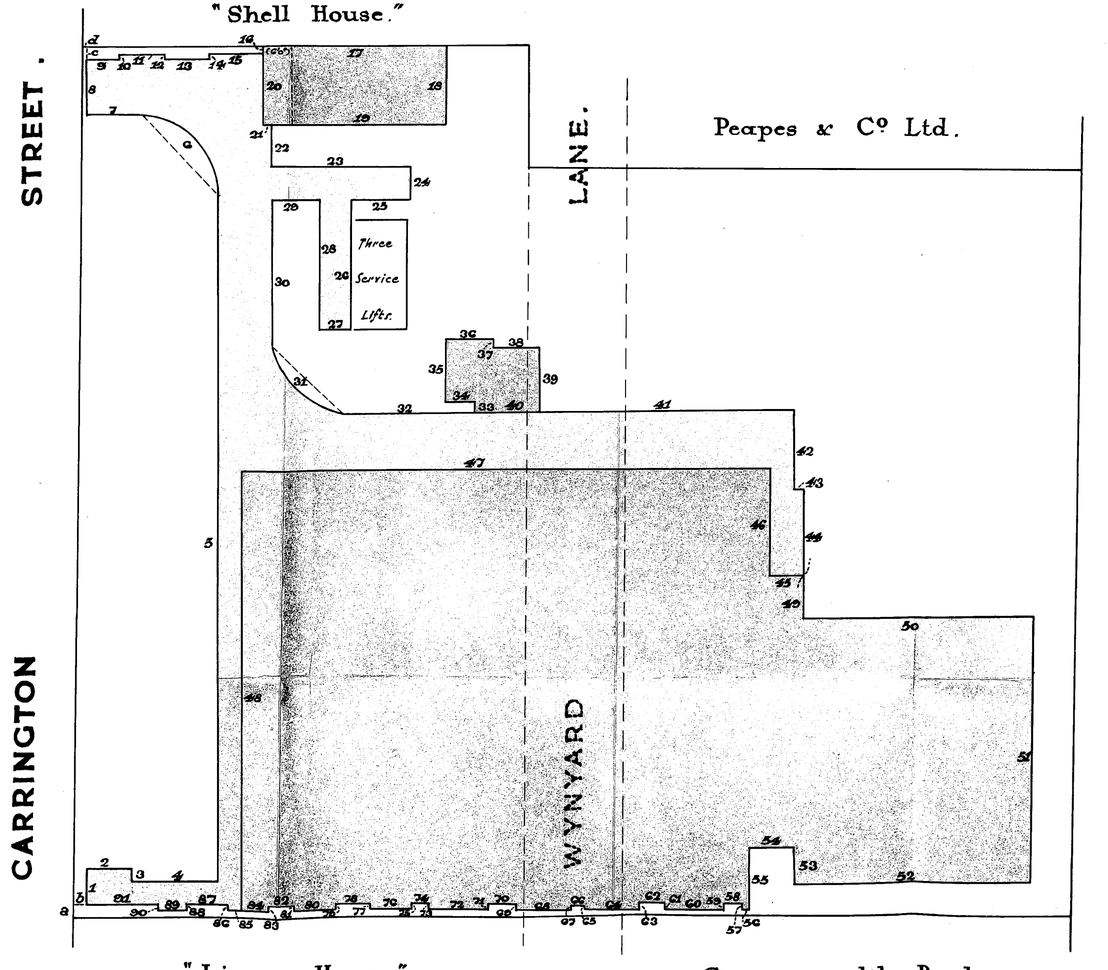
SCALE. 20 FEET TO AN INCH.

SCHEDULE.

LINE.	BEARING.	DISTANCE.	LINE.	BEARING.	DISTANCE.	LINE.	BEARING.	DISTANCE.
1	4° 55' 30"	7' 0 7/8"	31	Chord 138° 30'~ 19' 11½"		C1	4° 43'	1' 5⅛"
2	95° 07'	9' 0"		Rad. 20'0" Arc. 20' 10½"		C2	274° 43'	5' 0"
3	185° 07'	2' 6"	32	94° 43'	26' 7¼"	C3	184° 43'	1' 7¾"
4	95° 07'	17' 8 7/8"	33	4° 43'	2' 3"	C4	273° 49'	11' 6 7/8"
5	4° 43'	136' 8½"	34	274° 43'	6' 0"	C5	4° 43'	0' 7½"
6	Chord 319° 43'~ 22' 7½"		35	4° 43'	12' 7¼"	C6	274° 43'	1' 10¼"
	Rad. 16' 0" Arc 25' 1½"		36	94° 43'	9' 7¼"	C7	184° 43'	0' 8"
7	274° 43'	11' 0½"	37	184° 43'	1' 11 3/8"	C8	273° 49'	11' 5 5/8"
8	5° 11' 40"	11' 0 3/4"	38	94° 43'	9' 0"	C9	4° 43'	1' 9"
9	94° 44'	6' 8⅛"	39	184° 43'	12' 10 3/4"	70	274° 43'	5' 2"
10	4° 44'	1' 0 5/8"	40	94° 43'	12' 7¼"	71	184° 43'	1' 8"
11	94° 44'	9' 0"	41	94° 43'	51' 0"	72	274° 57'	12' 4½"
12	184° 44'	1' 0 5/8"	42	184° 43'	15' 10⅛"	73	4° 43'	1' 3⅜"
13	94° 44'	9' 1"	43	94° 43'	2' 0"	74	274° 43'	3' 2¼"
14	4° 44'	1' 0"	44	184° 43'	17' 8¼"	75	184° 43'	1' 2 5/8"
15	94° 44'	11' 7¼"	45	274° 43'	6' 6"	76	274° 43'	8' 8 5/8"
16	4° 43' 20"	1' 3½"	46	4° 43'	21' 6 3/8"	77	4° 43'	1' 2⅛"
17	94° 44'	37' 4"	47	274° 43'	106' 7¼"	78	274° 43'	6' 3⅝"
18	184° 43' 20"	15' 3"	48	184° 43'	87' 4⅛"	79	184° 43'	1' 0⅛"
19	274° 44'	37' 4"	49	184° 43'	8' 2⅛"	80	275° 16'	9' 5½"
20	4° 43' 20"	15' 3"	50	94° 43'	47' 0 7/8"	81	4° 43'	1' 0⅛"
21	94° 44'	1' 6 7/8"	51	185° 05' 30"	52' 7 7/8"	82	274° 43'	4' 9¾"
22	184° 43'	7' 11¼"	52	275° 16' 10"	48' 0"	83	184° 43'	1' 0¾"
23	94° 43'	27' 2¾"	53	4° 43'	7' 6"	84	275° 00'	6' 8½"
24	184° 43'	6' 3"	54	274° 43'	9' 0"	85	275° 00'	1' 8⅞"
25	274° 43'	11' 6"	55	184° 43'	12' 0"	86	4° 43'	1' 1½"
26	184° 43'	26' 0"	56	274° 43'	1' 4"	87	274° 43'	8' 3¼"
27	274° 43'	6' 2¾"	57	4° 43'	1' 2 7/8"	88	184° 43'	1' 1"
28	4° 43'	26' 0"	58	274° 43'	3' 10"	89	274° 43'	5' 9 5/8"
29	274° 43'	9' 6"	59	184° 43'	1' 2"	90	4° 43'	1' 1½"
30	184° 43'	29' 0 7/8"	60	275° 07'	12' 1"	91	274° 55' 30"	14' 5⅛"

CONNECTIONS.

a.	5° 11' 40"	2' 7¼"	c.	5° 11' 40"	2' 4 5/8"
b.	94° 55' 30"	2' 3 5/8"	d.	274° 44' 00"	0' 6½"



Signed..... Stewart J. Moore
Witness..... Ruth Towey

for and on behalf of the Commissioner for Railways.
W. A. King.
Asst. Secretary.
L. Muggeridge.
Witness.

This is the annexure marked "J" referred to in the attached Memorandum of Lease made between the Commissioner for Railways and Wynyard Holdings Limited.
Dated..... 19th December 1961.

EXHIBIT D

Exhibit D
Annexure 1
Lease Commissioner for Railways to Wynyard Holdings Limited

MEMORANDUM OF LEASE BETWEEN THE COMMISSIONER FOR RAILWAYS AND WYNYARD HOLDINGS LIMITED

Dated 22nd April, 1963

THIS DEED made the twenty-second day of April, one thousand nine hundred and sixty-three (in pursuance of the Conveyancing Act 1919 as amended) BETWEEN THE COMMISSIONER FOR RAILWAYS a body corporate created under or by virtue of the Transport (Division of Functions) Act 1932 as amended (hereinafter called the Lessor) of the one part AND WYNYARD HOLDINGS LIMITED a Company duly incorporated in the said State and having its registered office at 291 George Street Sydney in the State aforesaid (hereinafter called the lessor) of the other part supplemental to a Deed of Lease made the nineteenth day of December one thousand nine hundred and sixty one between the same parties as are parties hereto registered at the Registration of Deeds Office at Sydney on the fifth day of January one thousand nine hundred and sixty two Number 438 Book 2595 and under the Real Property Act 1900 Number H. 962793 (hereinafter referred to as the Main Lease) WHEREAS the Lessee has requested the Lessor to demise to the Lessee the Stratum of land hereinafter mentioned and has requested the licence of the Lessor to lay a terrazzo floor upon and attach a false ceiling to the premises of the Lessor (not included in the premises demised to the Lessee by the Main Lease or this present demise) which the Lessor has agreed to do subject to the provisions hereinafter contained NOW THIS DEED WITNESSETH that the Lessor doth hereby (with the approval of the Governor) demise unto the Lessee ALL THAT STRATUM of land forty seven square feet (47 sq. ft.) in area or thereabouts to the extent shown in Section B–B coloured red in the Plan hereto annexed (hereinafter referred to as the demised premises which expresion shall where the context so admits but subject to the exceptions and reservations hereinafter mentioned include any building structure fixture or improvement and all things thereto belonging which are at the commencement of or may during the term be erected placed or made by the Lessor or the Lessee on the said land and shall include any part thereof) for a term commencing on the twentieth day of August one thousand nine hundred and sixty two and expiring on the thirtieth day of November two thousand and fifty nine PROVIDED THAT if the Lessor permits the Lessee to continue in occupation of the demised premises after the expiration of the term the Lease shall continue as a tenancy from week to week only at a rent proportionate to the rent hereby reserved for the last year of the said term and otherwise subject to the covenants conditions and restrictions herein contained or implied YIELDING AND PAYING THEREFOR during the term the yearly rent of TWENTY SIX POUNDS (£26) for that part of the

Exhibit D — Annexure 1 — Lease Commissioner for Railways to Wynyard Holdings Limited

term expiring on the thirtieth day of November one thousand nine hundred and sixty four and for that part of the term commencing on the first day of December one thousand nine hundred and sixty four and thereafter during the term the yearly rent (whichever is the greater) of TWENTY SIX POUNDS (£26) OR a sum amounting to twenty six fifty three thousandths (26/53,000) of the yearly rent payable under the Main Lease PAYABLE by equal quarterly payments on the first day of every month of December March June and September in every year during the term the first of such payments including the rent payable from the twentieth day of August one thousand nine hundred and sixty two having become due and payable on the first day of September one thousand nine hundred and sixty two AND SUBJECT to the following covenants conditions and restrictions namely:—

1. EXCEPT as herein expressly provided this demise is made subject to the same exceptions and reservations and the covenants conditions and restrictions on the part of the Lessor and the Lessee respectively as are expressed or implied in the Main Lease and in particular to the provisions of Clause 55 of the Main Lease as to the title to the stratum hereby demised with such modifications only as are necessary to make the same applicable to the present demise and the parties hereto.

2. THE Lessee to the extent that the obligations may continue throughout the term hereby created covenants with the Lessor to perform and observe such of the covenants conditions and restrictions subject to which this demise is made as aforesaid as ought on its part to be observed and performed.

3. THE Lessor hereby covenants with the Lessee to perform and observe such of the covenants conditions and restrictions to which this demise is made as aforesaid as ought on its part to be performed and observed.

4. THE Lessor doth hereby grant licence to the Lessee to lay the said terrazzo floor upon and attach the said false ceiling to the premises of the Lessor respectively edged yellow and green on the said plan.

5. THE said licence shall not confer upon the Lessee any estate right title or interest (except as hereinafter expressly provided) in the said terrazzo floor and false ceiling which are hereby declared to be the property of the Lessor.

6. THE Lessee shall forthwith under the intermittent supervision and to the satisfaction of the Lessor the City Council and all competent Authorities and in all respects in accordance with plans previously approved by the Lessor such Council and Authorities and with any conditions of such approval and in accordance with all relevant ordinances regulations and by-laws and the lawful requirements of the Lessor such Council and Authorities lay the said terrazzo floor and attach the said false ceiling upon and to the premises of the Lessor respectively edged yellow and green on the said plan.

7. THE Lessee shall during the term of the Main Lease well and sufficiently repair maintain pave amend and keep the said terrazzo floor and false ceiling in good and substantial repair and condition in all respects when where and so often as need shall be PROVIDED that the Lessor shall during such term keep the said terrazzo floor in a clean condition.

IN WITNESS whereof the parties hereto have executed these presents the day and year first hereinbefore written.

The Common Seal of The Commissioner for Railways hath been hereunto duly affixed in the present of:—
D. COOTE, for Secretary for Railways.

The Common Seal of Wynyard Holdings Limited was hereunto affixed by authority of the Board of Directors previously given and in the presence of ERIC SEIDEL CLEMENTSON and BRUCE GRAHAM HELY two of the Directors thereof and of NEIL WILLIAM INGRAM the Secretary thereof.
N. W. INGRAM.

(L.S.)

B. G. HELY.

E. S. CLEMENTSON.

Valuation of Land Act, 1916 (as amended). *Schedule 7*

LG 662

DEPARTMENT OF THE VALUER GENERAL, N.S.W.—NOTICE OF VALUATION

VALUATION DISTRICT OF CITY OF SYDNEY — WARD OR RIDING GIPPS — VALUATION No. 710

OWNER'S NAME AND ADDRESS

Commissioner for Railways, C/– Railway Estate Agent,
19 York Street, SYDNEY, N.S.W. 2000

The Manager,
Wynyard Holdings Pty. Ltd.,
291 George Street,
SYDNEY, N.S.W. 2000

LESSEE'S NAME Wynyard Holdings Pty. Ltd., 291 George Street, SYDNEY, N.S.W. 2000

COUNTY — PARISH — TOWN OR VILLAGE

Regd. Ref. Vo. 3108 — Fo. 191 — D.P. — Other Tenure: Strata — Nature of Improvements: Hotel, Office, Shops in C/E — Locality or Estate:

To Title Bk. 1899 — No. 127

STREET George — SIDE W — House No. or Name: 289/307

Date Values take effect in Valuation Roll	Portion	Sec.	Lot	Area or Dimensions	Values Unimproved £	Values Improved £	Values Assessed Annual £	
12.10.62				147'9 × Irr / 172'11 × 202'3 except thereout various strata; together with various strata under Carrington St. & Wynyard Park with Appt. R O Ws. Subject to R O Ws.	1,250,000	4,000,000	200,000	Building incomplete. Rating and Taxing basis as at 1.1.56 £650,000 This amount will until the next valuation be used for rating and taxing purposes

THE VALUATIONS SHOWN HEREIN ARE FOR THE FEE SIMPLE IN POSSESSION

THIS IS NOTICE OF VALUATION ONLY, AND IS NOT INTENDED AS A NOTICE FOR PAYMENT OF RATES OR TAXES.

IMPORTANT—READ NOTES AT SIDE OF FORM. IN ALL CORRESPONDENCE PLEASE QUOTE VALUATION DISTRICT AND VALUATION NUMBER.

TAKE NOTICE THAT I HAVE ENTERED ON THE VALUATION ROLL OF THIS DEPARTMENT THE VALUATIONS OF THE {LAND / STRATUM} AS DESCRIBED HEREON AT THE AMOUNTS RESPECTIVELY STATED.

Dated at the Department of the Valuer General, 163 Phillip Street, Sydney.

H. W. Eastwood,
VALUER GENERAL

NOTE—*The values shown hereon until altered, may be used for resumption, rating, or taxing purposes. Should you desire to object, your objection should be made upon the form prescribed, obtainable at this Department and duly lodged within the period of forty-two days from the date of service of this notice. A Lessee, Occupier or Mortgagee in Possession lodging an objection to this valuation is required to notify all other persons interested (vide Section 29, Valuation of Land Act, 1916 as amended).*

If the whole or any part of the {land / stratum} stated hereon has been sold, or there are any errors in dimensions or description, or improvements have been added to or demolished, please furnish particulars thereof to this Department.

Pps.: 62/905812 R.E.
C.B.: 169/41
F.B.: Misc. 4067
Reg. Nº: 1920/45, 225

WYNYARD STATION

City of Sydney

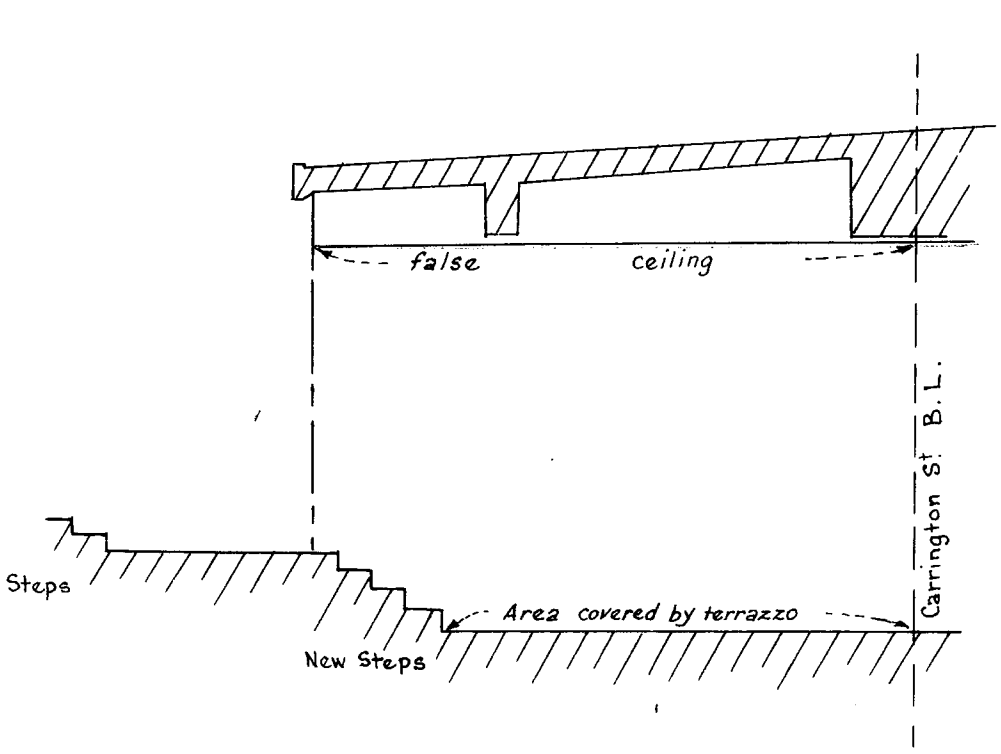
Land to be leased within a stratum to
Wynyard Holdings Limited

Parish of St Philip County of Cumberland

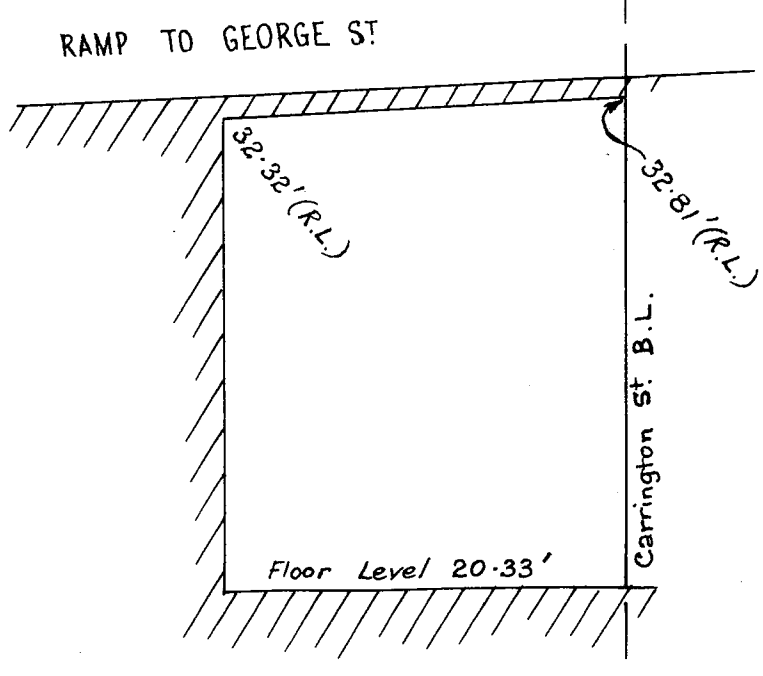
Scale: 5 feet to 1 inch

Lease registered at R.G's Office on 6.6.'63. Nº839 Book 2654

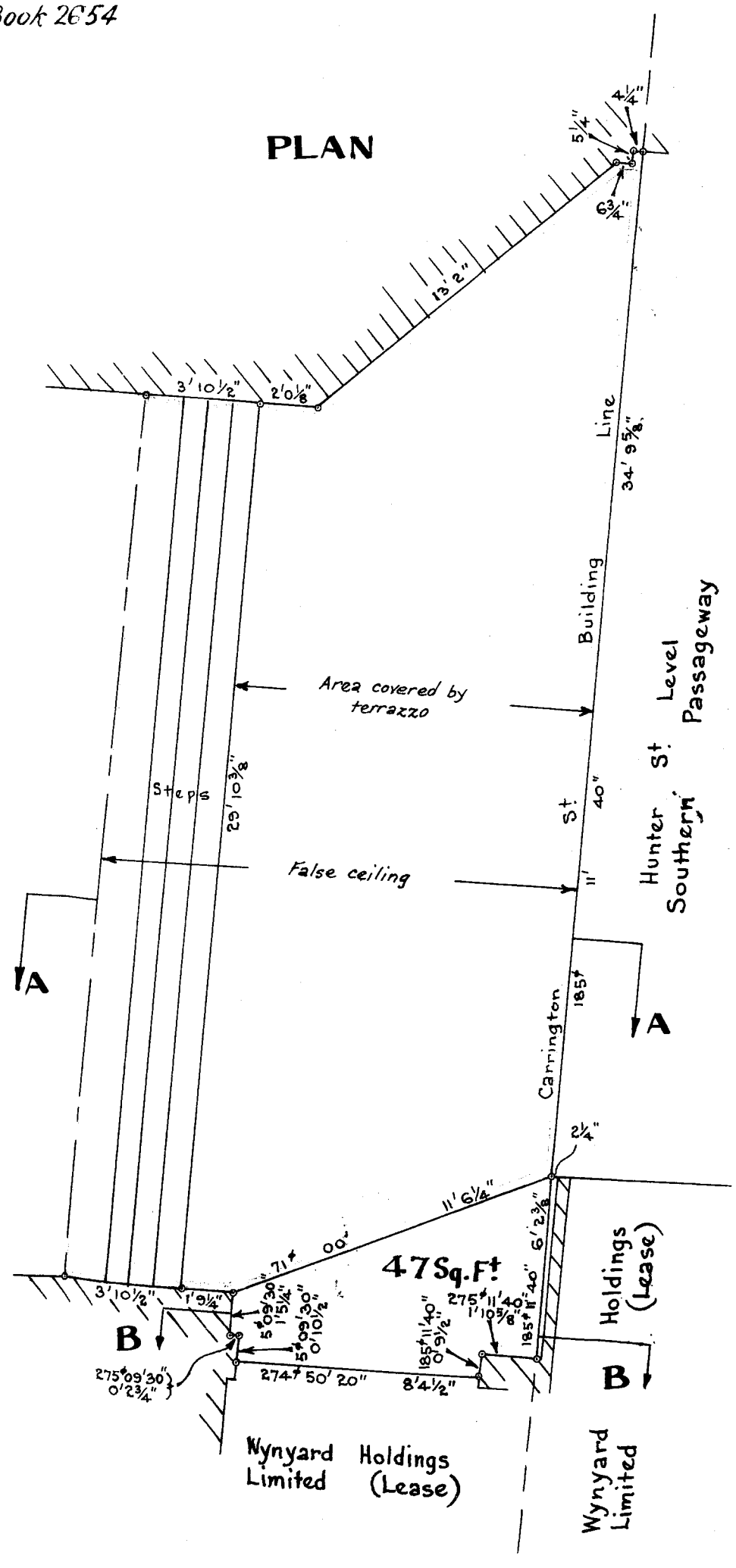
SECTION A–A



SECTION B–B



PLAN



This is the Plan referred to as annexure to ..... between the Commissioner for Railways, and Wynyard Holdings Limited. Dated this ..... day of ..... 196...

For and on behalf of
The Commissioner for Railways

Secretary for Railways.

For and on behalf of
Wynyard Holdings Limited

Secretary

Valuation of Land Act, 1916 (as amended). Schedule 7

G.710

DEPARTMENT OF THE VALUER GENERAL, N.S.W.—NOTICE OF VALUATION

VALUATION DISTRICT OF CITY OF SYDNEY — WARD OR RIDING GIPPS — VALUATION No. 4173

OWNER'S NAME AND ADDRESS

Wynyard Holdings Pty. Ltd.,
291 George Street,
SYDNEY, N.S.W. 2000

Commissioner for Railways,
C/- Chief Property Officer,
19 York Street,
SYDNEY, N.S.W. 2000

LESSEE'S NAME Wynyard Holdings Pty. Ltd., 291 George Street, Sydney, N.S.W. 2000

COUNTY — PARISH — TOWN OR VILLAGE

Regd. Ref. Vo. 3108 Fo. 191 D.P. — Other Tenure —
To Title Bk. 1899 No. 127 — Nature of Improvements: Building — Locality or Estate: Stratum.

STREET George — SIDE W — House No. or Name: 289/307

Date Values take effect in Valuation Roll	Portion	Sec.	Lot	Area or Dimensions	Values Unimproved £	Values Improved £	Values Assessed Annual £	
16.10.62				147'7 × Irr / 172'11 × 202'3 except thereout various strata; together with various strata under Carrington St. & Wynyard Park with Appt. R O Ws. Subject to R O Ws.	1,250,000	4,000,000	200,000	Ratio @ 5¼ £27,343.15.0.

THE VALUATIONS SHOWN HEREIN ARE FOR THE FEE SIMPLE IN POSSESSION

THIS IS NOTICE OF VALUATION ONLY, AND IS NOT INTENDED AS A NOTICE FOR PAYMENT OF RATES OR TAXES.

IMPORTANT—READ NOTES AT SIDE OF FORM. IN ALL CORRESPONDENCE PLEASE QUOTE VALUATION DISTRICT AND VALUATION NUMBER.

TAKE NOTICE THAT I HAVE ENTERED ON THE VALUATION ROLL OF THIS DEPARTMENT THE VALUATIONS OF THE {LAND / STRATUM} AS DESCRIBED HEREON AT THE AMOUNTS RESPECTIVELY STATED.

Dated at the Department of the Valuer General, 163 Phillip Street, Sydney.

H. W. Eastwood,
VALUER GENERAL

NOTE—*The values shown hereon until altered, may be used for resumption, rating, or taxing purposes. Should you desire to object, your objection should be made upon the form prescribed, obtainable at this Department and duly lodged within the period of forty-two days from the date of service of this notice. A Lessee, Occupier or Mortgagee in Possession lodging an objection to this valuation is required to notify all other persons interested (vide Section 29, Valuation of Land Act, 1916 as amended).*

If the whole or any part of the {land / stratum} stated hereon has been sold, or there are any errors in dimensions or description, or improvements have been added to or demolished, please furnish particulars thereof to this Department.

Exhibit A
Annexure 3
Notice of Valuation 4173

Exhibit A
Annexure 4
Notice of Altered Valuation 710

EXHIBIT A

VALUATION OF LAND ACT, 1916, AS AMENDED
NOTICE AS TO ALTERED VALUATION ON OBJECTION

Re: Objection No. 1962/243 Valuation District of Sydney
Valuation No. 710 Ward Gipps

Re: Wynyard Holdings Pty Ltd

I hereby give you notice that consideration has been given to the objection lodged by you against the values and description and dimensions of the strata comprised in the abovementioned Valuation Number and I have altered the values and description and dimensions as set out below.

Valuation No.	Unimproved Value	Improved Value	Assessed Annual Value
710	$1,100,000	$4,400,000	$220,000 as at 12-10-62

Rating and Taxing Basis 1/1/56 $569,000 Building incomplete

Strata—George Street Building "Wynyard House"

Basement level	3,086 Sq. Ft.
Hunter Arcade level	6,786 Sq Ft.
"Keller" Restaurant level	8,486 Sq. Ft.
George Arcade level	3,696 Sq. Ft.
Upper floors 1–13 (each 8,486 Sq Ft.)	110,318 Sq. Ft.
Upper floor 14 (plant room)	6,073 Sq. Ft.

Strata—Carrington Street Building "Menzies Hotel"
(includes strata above and below Wynyard Lane)

Basement level	6,258 Sq. Ft.
Hunter Arcade level	9,962 Sq. Ft.
"Keller" Restaurant level	3,848 Sq. Ft.
George Arcade level	7,351 Sq. Ft.
Restaurant level	9,059 Sq. Ft.
Carrington Street Foyer level	10,212 Sq. Ft.
Upper floor 1—First Function floor	13,164 Sq. Ft.
Upper floor 2—Second Function floor	10,536 Sq. Ft.

Strata—Under Wynyard Park and Carrington Street

Basement level	286 Sq. Ft.
Hunter Arcade level	327 Sq. Ft.
Upper Concourse Car Park level	15,786 Sq. Ft.

The Rating and Taxing Authorities will be advised and if you are satisfied with the altered values no further action by you is necessary.

Should you not be satisfied with the altered values, you may require the

Valuer-General to refer the objection to a Valuation Board, the Secretary of which will notify you of the time and place of hearing. At the hearing, there will be ample opportunity for you or your representative to submit evidence to the Board in support of your objection. Failure to attend at the hearing may result in an unfavourable determination of your objection by the Valuation Board.

Exhibit A
Annexure 4
Notice of Altered Valuation 710

Any request for reference of your objection to a Valuation Board must be made on the form attached which, if completed, should be returned to this Department within 21 days from the date of the service of this Notice.

H. W. EASTWOOD,
Valuer-General.
Per:

Dated at the Department of the Valuer-General,
163 Phillip Street, Sydney.
12th September, 1967.

The Manager,
R. V. Dimond Pty Ltd,
129 Pitt Street,
SYDNEY.

Exhibit A
Annexure 5
Notice of Altered Valuation 710

VALUATION OF LAND ACT, 1916, AS AMENDED
NOTICE AS TO ALTERED VALUATION ON OBJECTION

Re: Objection No. 1962/243 Valuation District of Sydney
Valuation No. 710 Ward Gipps

I hereby give you notice that con sideration has been given to an objection lodged by Wynyard Holdings Pty Ltd against the values and description and dimensions of the strata comprised in the abovementioned Valuation Number and I have altered the values and description and dimensions as set out below.

Valuation No.	Unimproved Value	Improved Value	Assessed Annual Value
710	$1,100,000	$4,400,000	$220,000 as at 12–10–62

Rating and Taxing Basis 1/1/56 $569,000 Building incomplete

Strata—George Street Building "Wynyard House"

Basement level	3,086 sq. ft
Hunter Arcade level	6,786 sq. ft
"Keller" Restaurant level	8,486 sq. ft
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Upper floors 1–13 (each 8,486 sq. ft)	110,318 sq. ft
Upper floor 14 (plant room)	6,073 sq. ft.

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The Rating and Taxing Authorities will be advised and if you are satisfied with the altered values no further action by you is necessary.

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there will be ample opportunity for you or your representative to submit evidence to the Board in support of your objection. Failure to attend at the hearing may result in an unfavourable determination of your objection by the Valuation Board.

Exhibit A
Annexure 5
Notice of Altered Valuation 710

Any request for reference of your objection to a Valuation Board must be made on the form attached which, if completed, should be returned to this Department within 21 days from the date of the service of this Notice.

H. W. EASTWOOD,
Valuer-General.
Per:

Dated at the Department of the Valuer-General,
163 Phillip Street, Sydney.
12th September, 1967.

The Commissioner for Railways,
19 York Street,
Sydney.

Exhibit A
Annexure 6
Notice of Altered Valuation 4173

EXHIBIT A

VALUATION OF LAND ACT, 1916, AS AMENDED
NOTICE AS TO ALTERED VALUATION ON OBJECTION

Re: Objection No. 1962/244 Valuation District of Sydney
Valuation No. 4173 Ward Gipps

Re: Wynyard Holdings Pty Ltd

I hereby give you notice that consideration has been given to the objection lodged by you against the values and description and dimensions of the strata comprised in the abovementioned Valuation Number and I have altered the values and description and dimensions as set out below:

Valuation No.	Unimproved Value	Improved Value	Assessed Annual Value
4173	$1,100,000	$4,400,000	$220,000 as at 16-10-62

Building incomplete

Strata—George Street Building "Wynyard House"

Basement level	3,086 Sq. Ft.
Hunter Arcade level	6,786 Sq. Ft.
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Basement level	286 Sq. Ft.
Hunter Arcade level	327 Sq. Ft.
Upper Concourse Car Park level	15,786 Sq. Ft.

The Rating and Taxing Authorities will be advised and if you are satisfied with the altered values no further action by you is necessary.

Exhibit A
—
Annexure 6
—
Notice of Altered Valuation 4173

Should you not be satisfied with the altered values, you may require the Valuer-General to refer the objection to a Valuation Board, the Secretary of which will notify you of the time and place of hearing. At the hearing, there will be ample opportunity for you or your representative to submit evidence to the Board in support of your objection. Failure to attend at the hearing may result in an unfavourable determination of your objection by the Valuation Board.

Any request for reference of your objection to a Valuation Board must be made on the form attached which, if completed, should be returned to this Department within 21 days from the date of the service of this Notice.

H. W. EASTWOOD,
Valuer-General.
Per:

Dated at the Department of the Valuer-General,
163 Phillip Street,
SYDNEY.
12th September, 1967.

The Manager,
R. V. Dimond Pty Ltd,
129 Pitt Street,
SYDNEY.

Exhibit A
Annexure 7
Notice of Altered Valuation 4173

EXHIBIT A

VALUATION OF LAND ACT, 1916, AS AMENDED NOTICE AS TO ALTERED VALUATION ON OBJECTION

Re: Objection No. 1962/244 Valuation District of Sydney
Valuation No. 4173 Ward Gipps

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Upper Concourse Car Park level	15,786 sq. ft

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Should you not be satisfied with the altered values, you may require

Exhibit A
Annexure 7
Notice of Altered Valuation 4173

the Valuer-General to refer the objection to a Valuation Board, the Secretary of which will notify you of the time and place of hearing. At the hearing, there will be ample opportunity for you or your representative to submit evidence to the Board in support of your objection. Failure to attend at the hearing may result in an unfavourable determination of your objection by the Valuation Board.

Any request for reference of your objection to a Valuation Board must be made on the form attached which, if completed, should be returned to this Department within 21 days from the date of the service of this Notice.

10 H. W. EASTWOOD,
Valuer-General.
Per:

Dated at the Department of the Valuer-General,
163 Phillip Street, Sydney.
12th September, 1967.

The Commissioner for Railways,
19 York Street,
Sydney 2000.

Exhibit F
Annexure 8
Building Progress Report

THE WYNYARD PROJECT CONSTRUCTON PROGRESS REPORT No. 9

15th October, 1962.

1. OFFICE BLOCK

Cleaning down the external faces is in progress. The George Street awning is being erected and finishing work is proceeding on all floors, except the first and second.

On the second floor, air conditioning ducts, sprinkler pipes and timber framework for the ceiling have been erected.

Office partitions on the 11th and 12th floors for Lintas and intertenancy partitions on the 5th and 6th floors are being erected.

2. SHOPS

The tenant's contractor has been given access to the coffee lounge (G. 12A) to execute the finishes required, all brickwork having been completed. Work will proceed on shops 10 and 10A.

Shop G. 61 is virtually complete.

3. MENZIES ARCADE

Shopfronts have been erected. Air conditioning ducts and sprinklers are being installed and being followed by ceilings and finishing trades.

4. BARS AND BOTTLE DEPARTMENTS

(a) George Street Northern Bar. Air conditioning ducts have been erected, bar counters and ceilings are in progress.

(b) George Street South-Eastern Bar is complete and open.

(c) Cocktail Lounge, 1st Floor Office Block (Jungle Bar) walls are being plastered and the bar counter being constructed.

(d) Mezzanine Lounge. The bar counter is complete and the Lounge is partially open while work proceeds.

(e) Hunter Street Saloon Bar is complete and open.

(f) Carrington Street Bottle Department and Upper and Lower Bars, brickwork is in progress.

5. HOTEL

Concrete up to Function Room level is virtually complete. The southern end of the 1st Bedroom floor has been cast. Work below George Street level is proceeding.

6. CAR PARK

A certificate of practical completion has been issued. The date of acceptance being 1st October, 1962.

Exhibit F

Annexure 8

Building Progress Report

7. CONSTRUCTION ESTIMATES

The project will be completed for the original estimated costs.

8. PROGRESS CERTIFICATES

(a) Office and Hotel Contract. Progress certificate number 14 for $164,395 gives a total payment to date of $1,485,165.

S. E. COHEN,
Construction Supervisor.

Exhibit P

Annexure 10

History of Site

EXHIBIT P

HISTORY OF SITE

The City and Suburban Electric Railways Act 1915 authorized the construction of a railway in the City of Sydney. The authorized work was described in the First Schedule to the Act as including an underground station "under Wynyard Square".

In the years 1915 and 1916, by means of conveyances and resumptions, the Minister for Public Works acquired from various owners thirteen lots to the east of Wynyard Square between it and George Street. Seven of these lots in Carrington Street had a total frontage thereto of approximately 173 feet. They were separated at their rear boundaries by Wynyard Lane from the remaining six lots which had a total frontage to George Street of approximately 147 feet. The whole of the land comprised in these thirteen lots was held under common law title except for the two northernmost lots in Carrington Street, which were held under the Real Property Act 1900 (as amended) and were the whole of the land in Certificate of Title Volume 3108 Folio 191.

By Act No. 73 of 1924 there was inserted in the Government Railways Act 1912 a new Section which read as follows:

> "12A. (1) All lands resumed or acquired for the purpose of the works authorised by the City and Suburban Electric Railway Act, 1915, are hereby transferred to and vested in the Commissioners for all the estate and interest for which the same were prior to the passing of this Act vested in the Secretary for Public Works as Constructing Authority.
>
> (2) Where any of the said lands are leased to any person the same shall be ratable under the Sydney Corporation Act, 1902, and Acts amending the same."

Wynyard Lane was laid out in a Crown subdivision prior to 1850 and has at all times been a public road. By s. 76B added in 1934 to the Sydney Corporation Act, 1932, it was provided that every public way in the city and the soil thereof should vest in fee simple in the Municipal Council of Sydney.

In the year 1926 work commenced on the construction of an underground railway station and approaches thereto under York Street, Wynyard Square and Carrington Street. Wynyard Square had been Crown land dedicated for public recreation and was ultimately vested in the Municipal Council of Sydney as trustees under the Public Parks Act 1884. It does not appear in whom the material portions of Carrington Street and York Street were vested before the said s. 76B was enacted: See *Wynyard Investments Pty Limited* v. *Metropolitan Water Sewerage and Drainage Board* (1953) 19 L.G.R. 26, at p. 27.

125A

CORAM: ELSE-MITCHELL, J.,

Confidential V Valuer General

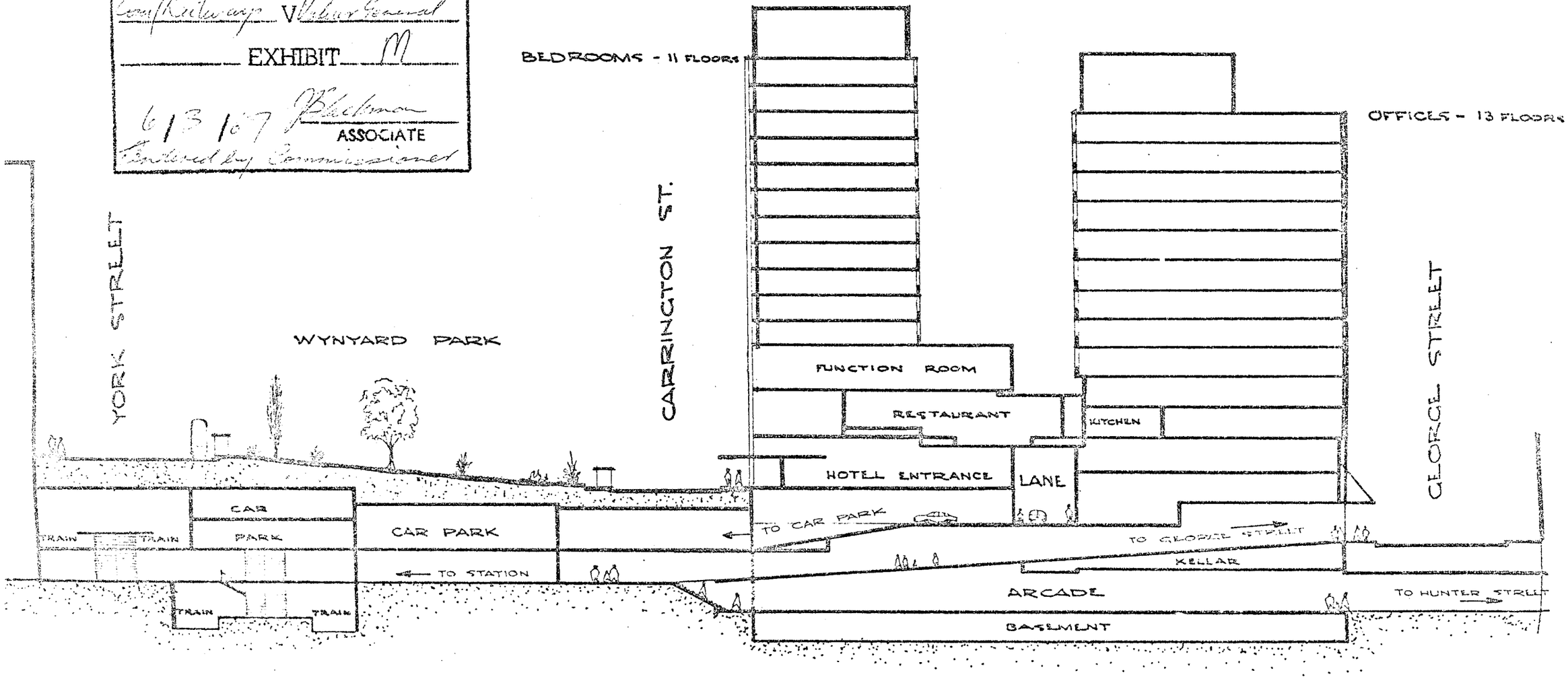
EXHIBIT M

6/3/07 Blackman ASSOCIATE

Tendered by Commissioner

MENZIES HOTEL

WYNYARD HOUSE



Concurrently with this work buildings on the thirteen said lots facing Carrington Street and George Street were demolished and the entire site including Wynyard Lane between the northernmost boundary of the lots facing George Street and the southernmost boundary of those lots was excavated. By 1930 that excavation was completed to a level base below the respective streets.

By 1931 the excavation under York Street, Wynyard Square and Carrington Street had been filled with steel work to carry the trains, the platforms of Wynyard Station and pedestrian areas.

Wynyard Station was opened for traffic in February, 1932. The excavated site to the east of the eastern boundary of Carrington Street remained unfilled but the Commissioner for Railways constructed across it in an east-west direction a covered pedestrian ramp to enable pedestrians to move to and fro between the underground station and the western footpath of George Street and between the station and the pedestrian tunnel leading under George Street from Hunter Street.

At some time after 1935 work was done by the Commissioner for Railways in the construction of foundations and a building framework below the level of Wynyard Lane. Authority to do so was derived from section 25 of the Transport (Division of Functions) Act, 1932, which was in the following terms:

> "25. The Commissioner for Railways may in respect of the parcels of land in the City of Sydney between George Street and Wynyard Lane, and Wynyard Lane and Carrington Street, respectively, which were resumed for the purposes of the construction of and provision of access to Wynyard Railway Station, permit the erection, making or construction of a building or part of a building across or under Wynyard Lane, but any such building shall be so constructed as to leave a clear space of not less than twenty feet above the surface of the roadway of such lane when it is restored, and as not to impede or restrict pedestrian or vehicular traffic in and along such lane."

By the year 1940 the surface of Wynyard Lane had been restored to through traffic.

On part of the land acquired as a result of the purchases and resumptions of 1915 and 1916 were premises known as the Cafe Francais which were licensed under the Liquor Act and in due course the Commissioner for Railways became the owner of that licence. The licence was retained and after demolition of the premises to which the licence attached and the excavation of the land temporary licensed premises were constructed on the site.

In 1927 tenders had been called by the Commissioner for Railways for a lease of lands between Carrington Street and George Street for a term of 60 years upon condition that a hotel costing at least £150,000 0s. 0d. be built on the site. The events of the intervening years in relation thereto are set out

Exhibit P — Annexure 10 — History of Site

in the judgment of the Judicial Committee in *Commissioner for Railways* v. *Avrom Investments Pty Limited* (1959) S.R. (N.S.W.) 63; (1959) 1 W.L.R. 389.

In 1941 a 60-year lease was granted by the Commissioner to Mrs Gardiner and the Permanent Trustee Company Limited which contained a covenant on the part of the lessee to build a hotel on the site. The premises demised in this lease corresponded with the land originally purchased and resumed; they did not include Wynyard Lane or anything west of the eastern building line of Carrington Street. There was excluded from the demised space for two passageways running in an east–west direction from the western footpath of George Street to the Wynyard Station concourse under Carrington Street and Wynyard Park and also two passageways running from the Hunter Street tunnel under George Street to that concourse. There was also excluded from the demised premises at certain levels areas associated with a goods lift. These matters are more particularly set out in the said lease—Exhibit "S".

By 1942 a two-storey building then known as the Plaza Hotel had been erected along the George Street frontage of this land. It contained two sloping pedestrian passageways from George Street and two horizontal passageways at the Hunter Street level. No building work had proceeded at the Carrington Street frontage above street level save for some steel columns.

In 1943 the said lease was assigned to Avrom Investments Pty Limited and for a considerable period thereafter no building work was done. There then occurred the litigation between the Commissioner and the above referred to lessee.

Avrom Investments Pty Limited in 1960 assigned its lease to Wynyard Plaza Pty Limited which Company subsequently changed its name to Wynyard Holdings Limited.

Subsequently there were negotiations between the Commissioner and the lessee leading to an arrangement which involved the surrender of the existing lease on condition that a new lease was entered into on revised rental terms and conditions.

Building work re-commenced towards the end of 1960 in advance of the execution of the new lease. Plans were drawn up for the construction on the subject site of a thirteen-storey office block facing George Street and a fourteen-storey hotel facing Carrington Street.

At this stage the Wynyard tramway tunnel being the eastern of the two uppermost tunnels was disused. On the upper concourse immediately to the east of this disused tramway tunnel and on the same level there were housed railway records, the model railway store and other railway occupations.

On 19th December, 1961, a lease was entered into with Wynyard Holdings Limited for a term of 98 years from 1st December, 1961.

MENZIES HOTEL

Comparison of Land - Strata on Leased Land

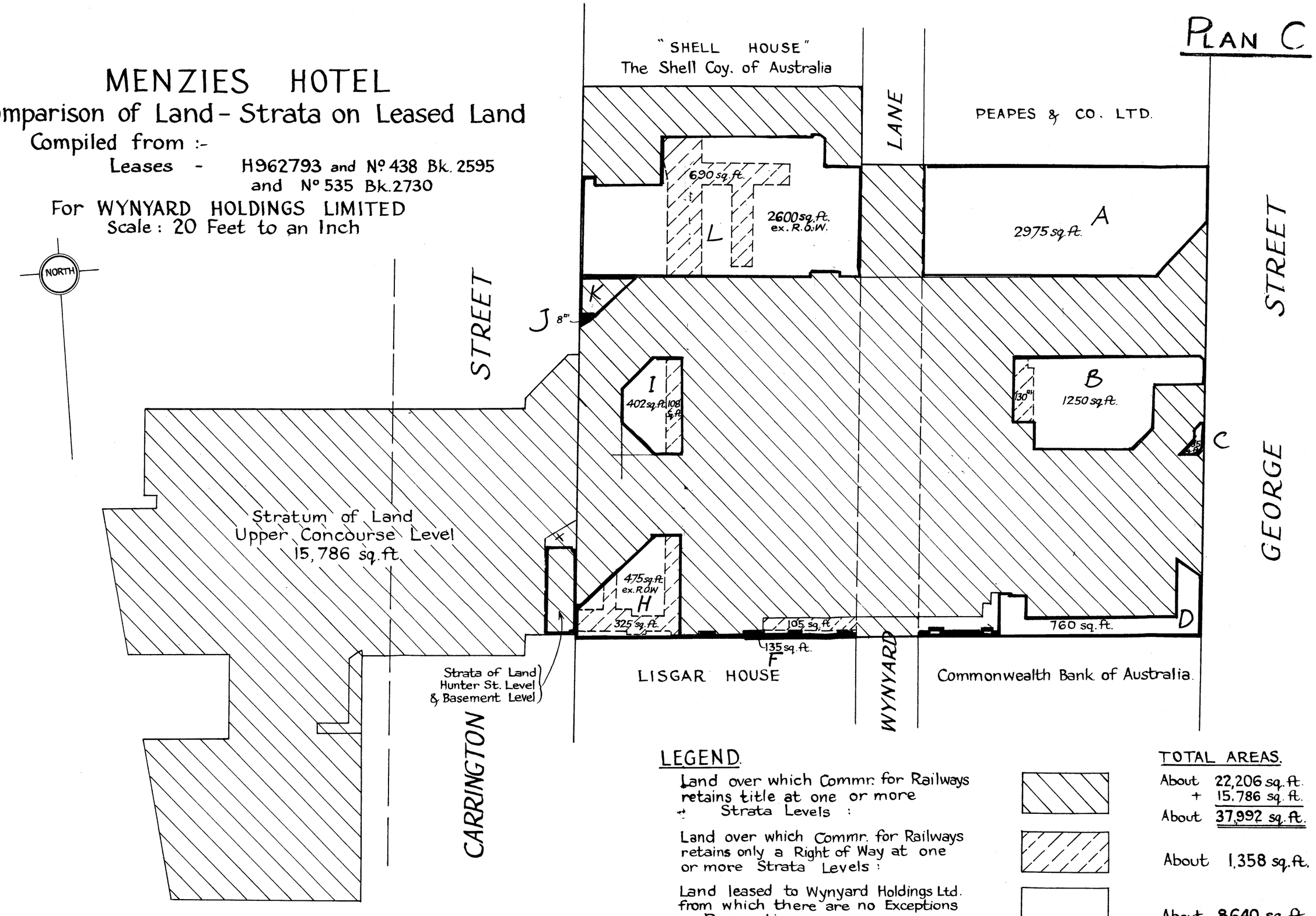
Compiled from :-

Leases - H962793 and Nº 438 Bk. 2595
and Nº 535 Bk. 2730

For WYNYARD HOLDINGS LIMITED

Scale : 20 Feet to an Inch

PLAN C



LEGEND.

Land over which Commr. for Railways retains title at one or more Strata Levels :

Land over which Commr. for Railways retains only a Right of Way at one or more Strata Levels :

Land leased to Wynyard Holdings Ltd. from which there are no Exceptions or Reservations :

TOTAL AREAS.

About 22,206 sq.ft.
\+ 15,786 sq.ft.
About 37,992 sq.ft.

About 1,358 sq.ft.

About 8,640 sq.ft.

ARCHITECTS - Alan Williams & Associates
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